87-954

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

vs.

4550 MAIN ASSOCIATES, A PARTNERSHIP, FRANK S. JENNINGS
and
FRED E. CULVER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS - WESTERN DISTRICT

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QUESTION PRESENTED

Whether a railroad right-of-way under the exclusive jurisdiction of the Interstate Commerce Commission can be lost to public use through abandonment before the effective date of an ICC Certificate permitting abandonment when the ICC has determined, pursuant to 49 U.S.C. §10906, that the right-of-way is suitable for mass transportation purposes and has ordered that the right-of-way be preserved for 180 days for sale for public purposes and when petitioner purchased the right-of-way, for use in a light rail mass transportation system, before the expiration of the 180 days and before the effective date of the ICC Certificate permitting abandonment.

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PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS - WESTERN DISTRICT

Petitioner, Kansas City Area Transportation Authority (KCATA) prays that a Writ of Certiorari issue to review the Judgment and Order of the Missouri Court of Appeals - Western District entered September 16, 1987.

OPINION BELOW

The opinion of the Missouri Court of Appeals - Western District (Appendix A) is not yet reported.

JURISDICTION

The opinion of the Missouri Court of Appeals - Western District (Appendix A), was filed on November 12, 1986. A timely Application to Transfer to the Supreme Court of Missouri was granted on March 17, 1987. On September 4, 1987 the Supreme Court of Missouri, after hearing oral argument, entered its Order, without opinion, retransferring the case to the Missouri Court of Appeals - Western District (Appendix C). By order dated September 16, 1987 (Appendix B), the Missouri Court of Appeals - Western District readopted its opinion filed November 12, 1986. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. §1257(3).

It is noted that the opinion below remands the case for trial on the issue of respondents' counterclaim damages for rents and profits derived by KCATA during its possession of the right-of-way. Clearly, the substantive federal question will survive the trial on this remaining issue and require the decision of this Court. The opinion of the state court with respect to the federal issue is, for all practical purposes, final. The application of pragmatic principles compels a finding that the judgment is "final" for jurisdictional purposes. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L.Ed. 2092 (1945); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 9 L.Ed.2d 523, 83 S.Ct. 520.

STATUTORY PROVISIONS INVOLVED

This case involves 49 U.S.C. §§10903 and 10906 set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner, Kansas City Area Transportation Authority is a bi-state agency created by compact between the States of Missouri and Kansas and approved by Congress in 1966 (Public Law 89-599, 80 Stat. 826; R.S.Mo. §238.010; K.S.A. §12-2524). KCATA is charged with the responsibility of providing passenger transportation in the Kansas City metropolitan area.

The Country Club Right-of-Way is a railroad right-of-way approximately eight and one half miles long located in Kansas City, Jackson County, Missouri extending through heavily populated residential and commercial areas. KCATA began its efforts to acquire the Country Club Right-of-Way in 1970 after the right-of-way had been designated by planning agencies as holding an integral role in future passenger transportation development. The right-of-way was owned by a partnership consisting of the family of James G. Ashley and doing business as Kansas City Public Service Freight Operation (hereinafter "Freight Operation"). Freight Operation discontinued freight hauling in 1968 when the demand for freight service was eroded by an impending condemnation action of KCATA. Freight Operation, a carrier certified by the ICC, duly filed its notice of embargo in 1968.

KCATA commenced an action to condemn the Country Club Right-of-Way in 1970. In December, 1973,

KCATA took possession of the right-of-way pursuant to the condemnation award. Freight Operation appealed the case and, ultimately, the Supreme Court of Missouri en banc, issued its opinion and held:

> The effect of ATA's condemnation action, if successful, would be that it would take over the entire railroad right-of-way and bring about a permanent and total cessation of railroad service by appellant-railroad as well as any other railroad over this entire line of track. The appellant-railroad, however, remains under the jurisdiction of the ICC and the legal abandonment of its line of track or discontinuance of service can only be accomplished by order of the ICC. 49 U.S.C. sec. 1a(1); *Kansas City Area Transportation Authority v. Ashley*, 555 S.W.2d 9, 10 (Mo. banc 1977).

As a result of this ruling, the Country Club Right-of-Way was returned to Freight Operation. This Court denied KCATA's Petition for Writ of Certiorari. 434 U.S. 1066, 55 L.Ed.2d 767, 98 S.Ct. 1243.

Since shortly after the embargo of its freight service in 1968, Freight Operation had consistently declared its intention to negotiate a sale of the right-of-way to KCATA for use in a light rail mass transportation system. Negotiations following the condemnation action, however, were unsuccessful and, in 1980, KCATA sought relief from the Interstate Commerce Commission (ICC Finance Docket Nos. 29330 and 29485); *Modern Handcraft, Inc. - Abandonment in Jackson County, MO*, 363 ICC 969 (1981)). The ICC exercised its jurisdiction over the railroad, and, in a series of rulings, issued its Certificate of Public Convenience and Necessity permitting Freight Operation

to abandon the right-of-way. The ICC, however, attached certain conditions to the exercise of the Certificate. In its decision dated August 19, 1981, the ICC ruled: "Freight Operation shall keep intact all of the right-of-way underlying the track, and all bridges and culverts on the line for a period of 180 days from the effective date of this decision to permit any State or local government agency or other interested party to negotiate the acquisition for public use of all or any portion of this line."

The ICC ordered: "Subject to the conditions set forth above, an appropriate Certificate of Abandonment shall be issued. The railroad shall not effect abandonment prior to the effective date of the Certificate of Abandonment."

In its decision dated October 30, 1981, the ICC declared that the effective date of the certificate permitting abandonment was November 2, 1981. On October 27, 1981, KCATA and Freight Operation concluded the sale of the Country Club Right-of-Way to KCATA and the right-of-way was conveyed to KCATA on that date. Thus, KCATA acquired the right-of-way with the explicit purpose of using it for light rail mass transportation, as contemplated by 49 U.S.C. §10906, prior to the expiration of the 180 days and prior to the time when Freight Operation was permitted by the ICC to abandon the line. Freight Operation retained trackage rights over the Country Club Right-of-Way as a condition of the sale. Furthermore, Freight Operation did not and has not exercised the certificate permitting abandonment of the line.

This case ensued when respondents, owners of property abutting the right-of-way, built a structure which encroached on the right-of-way. Petitioner filed suit in

1983 seeking the removal of the encroachment and respondents filed their counterclaim alleging the abandonment of the right-of-way by Freight Operation and that KCATA had no legal interest in the right-of-way. Respondents also sought damages consequent to KCATA's possession of the right-of-way. The case was tried to a jury and a verdict returned in favor of KCATA. Judgment was entered on the verdict holding that there had been no abandonment of the right-of-way under Missouri abandonment law. Respondents appealed the judgment.

The Missouri Court of Appeals - Western District issued its Opinion on November 12, 1986 reversing the judgment in favor of KCATA (Appendix A). The Court did not consider, in its opinion, the principal contention of KCATA that an observance of federal ICC law required that the judgment be affirmed. Rather, the Missouri Court premised its ruling on the basis that KCATA was collaterally estopped on the issue of abandonment because the ICC had stated, in its August 19, 1981 decision that there had been a *de facto* abandonment of the Freight Operation line. Neither the Missouri Court of Appeals - Western District nor respondents have ever explained how the ICC could have found that the right-of-way had been abandoned and then proceeded to declare that it could not be abandoned, at least until November 2, 1981, and that it must be preserved for sale for public purposes for 180 days after that.

Nor can the decision below be upheld on the basis that there is an adequate state ground for the decision. The opinion of the Missouri Court of Appeals suggests that the Ashleys (Freight Operation) elected to abandon by concluding the sale of the railroad property to KCATA.

The Missouri Court draws the conclusion that the sale itself foreclosed any resumption of service over the line by Freight Operation. Such a conclusion ignores (1) the fact that the rail carrier reserved trackage rights on the right-of-way as an express condition of the sale and (2) that a sale of a right-of-way by one carrier (Freight Operation) to another (KCATA) does not accomplish an abandonment of the right-of-way.

The Missouri Court of Appeals further attempts to bootstrap its opinion by characterizing the facts relating to abandonment of the railroad easement under state law as "uncontested." To begin with, the jury that heard the evidence of Freight Operation's struggle to maintain and defend their ownership of the line decided that there had been no abandonment under state law. More importantly, the assertion that there was an abandonment under state law begs the question of whether there can be an abandonment absent an effective ICC certificate permitting it.

KCATA sought transfer from the Missouri Court of Appeals - Western District to the Missouri Supreme Court which transfer was granted. However, after oral argument, the Missouri Supreme Court entered its Order, without opinion, that the case be retransferred to the Missouri Court of Appeals - Western District (Appendix C). By its Order dated September 16, 1987, the Missouri Court of Appeals - Western District readopted its Opinion issued November 12, 1986 (Appendix B).

HOW THE FEDERAL QUESTION WAS PRESENTED

KCATA filed its Motion for Summary Judgment on Respondents' counterclaim with the trial court alleging:

> 1. That each of the several counts in Defendants' [Respondents'] counterclaim are premised on the claim that the property in question, which is part of the strip of land known as the Country Club Right-of-Way, has reverted to ownership of the defendants because the right-of-way has been abandoned. The statutes of the United States, 49 U.S.C. 10903 through 10907, establish the procedures which must be followed before a railroad right-of-way of this type (which is under the jurisdiction of the ICC) can be abandoned. In this instance, these conditions precedent to abandonment have not occurred and, therefore, there has been no abandonment of the Country Club Right-of-Way as a matter of law.

Petitioner's Motion was denied and the case proceeded to trial by jury. KCATA, submitted to the Court a proposed verdict directing instruction setting forth those elements which KCATA contended respondents should be required to prove to sustain a verdict. That instruction is as follows:

> Your verdict must be for defendant [respondents] if you believe: 1) A Certificate of Public Convenience and Necessity permitting the abandonment of the Country Club Right-of-Way was issued by the Interstate Commerce Commission and 2) the said Certificate of Public Convenience and Necessity became effective, and 3) all conditions of the said Certificate

of Public Convenience and Necessity had been met or had expired, and 4) thereafter, the Country Club Right-of-Way was abandoned.

The Court rejected this instruction and submitted the case to the jury on the factual issue of abandonment of the railroad easement by Freight Operation under Missouri law. The verdict returned by the jury was that there had been no abandonment by Freight Operation and judgment was entered in favor of KCATA.

Respondents appealed the judgment. KCATA filed its brief on appeal the principal point of which was the same contention it had raised in its Motion for Summary Judgment, to-wit: inasmuch as (1) the ICC was exercising its jurisdiction over the railroad line in November of 1981, and (2) had ordered that Freight Operation could not abandon the right-of-way before November 2, 1981 and had ordered the right-of-way preserved for 180 days and made available for sale for transportation purposes, and (3) since KCATA had purchased the right-of-way on October 27, 1981, there could have been no abandonment as a matter of law.

REASONS FOR GRANTING WRIT

I. The decision below conflicts, in principal, with the decision of this Court as to the pre-emption, by the Interstate Commerce Act, of a state court order which finds an abandonment of a railroad right-of-way before such abandonment is permitted by the ICC.

This Court, in *Hayfield Northern Railroad Co., Inc. v. Chicago and Northwestern Transportation Co.*, 467 U.S. 622, 81 L.E.2d 527, 104 S.Ct. 2610 (1984), decided that the

Staggers Rail Act Amendment to the Interstate Commerce Act, 49 U.S.C. §§10903-10906, did not pre-empt a state eminent domain statute used to condemn rail property *after* the property had been abandoned pursuant to the amendment. Special care was taken by this Court to distinguish the facts in that case, where the rail carrier had sought, received and exercised an ICC Certificate permitting abandonment, from a case where, as here, a state court presumes to find that an abandonment occurred *before* it had been permitted by the ICC.

Justice Marshall, delivering a unanimous opinion, stated in *Hayfield*:

> With exceptions irrelevant to this case[10] the provisions of the [Interstate Commerce] Act relate to requirements that must be met *before* the Commission will authorize an abandonment. Therefore, unless the Commission attaches postabandonment conditions to a Certificate of Abandonment, the Commission's authorization of an abandonment brings its regulatory mission to an end.[11] (Emphasis in original text) 81 L.Ed.2d at 537.

The footnotes referred to above are particularly instructive.

> [10]See e.g. 49 U.S.C. §10906: "If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable

terms, for sale for public purposes." 81 L.Ed.2d at 537.

[11]This does not mean that in the postabandonment period, States are free to undo the very purposes for which the Commission authorized an abandonment. For example, if the Commission authorized an abandonment on the ground that relocation of the track was essential to enable the carrier to provide adequate service elsewhere, pre-emption would almost certainly invalidate a subsequent order by a state court barring such a transfer. 81 L.Ed.2d at 537.

The opinion below by the Missouri Court of Appeals - Western District ignores the ICC's ruling, ignores the sale of the right-of-way to KCATA and allows the disintegration of the right-of-way by reversion to thousands of landowners whose properties abut the right-of-way. While this Court found in *Hayfield*, that the Interstate Commerce Act did not pre-empt state action with respect to railroad right-of-way property that had been abandoned pursuant to the Act, there can be no question but that the Act must pre-empt state action which requires abandonment of a railroad right-of-way prior to the time an abandonment is authorized by the ICC.

In cases where an abandonment of a railroad right-of-way has been sought pursuant to state law but prior to the issuance of an effective ICC Certificate permitting abandonment, it has been held that such efforts usurped the authority of the ICC and were, therefore, unconstitutional under the Supremacy Clause, Article VI, Constitution of the United States. *Louisiana & Arkansas Railway Co. v. Bickham*, 602 F. Supp. 383 (D. La. 1985); *Trustees of the Diocese of Vermont v. State of Vermont*, 496 A.2d 151 (Vt. 1985).

The Missouri Court's ruling that KCATA was estopped to deny the abandonment of the right-of-way was based solely upon one sentence in the ICC decision dated August 19, 1981 which said that "the record leaves no doubt that a de facto abandonment of the Freight Operation line has taken place." It is clear, though, that the ICC has no jurisdiction to determine if an abandonment has already occurred. The Interstate Commerce Act provides the ICC with jurisdiction in abandonment cases but such jurisdiction does not extend beyond a determination of whether "the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. §10903. A case dealing squarely with the extent of ICC jurisdiction under similar circumstances is *Powell v. United States*, 300 U.S. 275, 81 L.Ed. 643 (1937). There, the Court held that the ICC's role was confined to finding whether the present and future public convenience and necessity required or permitted the extension [or abandonment] of a line.

Plainly, the ICC could not have found that the railroad right-of-way was abandoned and then, in the same decision, order that there could be no abandonment of the line, at least until the effective date of a Certificate permitting abandonment. It is obvious that the "de facto abandonment" language of the ICC was mere dicta and beyond the scope of its jurisdiction. Therefore, it cannot serve as the basis for the opinion of the Court below.

II. The opinion below contravenes Congress' express intent that railroad property, no longer required for interstate commerce, be preserved where it is needed for other public purposes.

The consequence of the opinion of the Missouri Court of Appeals - Western District, if allowed to stand, is

that a railroad right-of-way strategically located in the heart of Kansas City's residential area will be lost to the agency which acquired it for use in a light rail mass transportation system. It is not hard to understand the Congressional purpose behind 49 U.S.C. §10906 (Appendix D). Railroad rights-of-way were formed, for the most part, for the shipping of freight. When that service is no longer needed the rights-of-way can be extremely valuable for passenger transportation systems particularly when extensive development has occurred around the right-of-way. Congress decided it unthinkable that a railroad right-of-way devoted to freight service should be lost to public use just because the need for freight service abated. Congress, through the Staggers Act, provided for the orderly transfer of such rights-of-way from one public use to another. 49 U.S.C. §10906.

The ICC, in fact, determined that the Country Club Right-of-Way was suitable for public purposes and, accordingly, attached to its Certificate permitting an abandonment a prohibition on the disposal of the rail properties unless they were first offered for sale for public purposes pursuant to 49 U.S.C. §10906. KCATA's purchase of the right-of-way from Freight Operation, before the effective date of the Certificate permitting abandonment, accomplished precisely the Congressional intent to preserve railroad rights-of-way for other transportation purposes.

In this case, KCATA sought to take advantage of §10906. The ruling below, however, ignoring as it does the requirements of the ICC orders, undoes the purchase and destroys the right-of-way.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Missouri Court of Appeals - Western District.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOTICE

THIS OPINION IS NOT FINAL UNTIL ALL POST HANDDOWN MOTIONS HAVE BEEN DISPOSED OF AND THE MANDATE ISSUED AND RECEIVED.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KANSAS CITY AREA TRANSPORTATION AUTHORITY,	)	
Respondent,	)	No. WD 37398
-vs-	)	OPINION FILED:
4550 MAIN ASSOCIATES, INC. et al.,	)	NOVEMBER 12, 1986
Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY
HONORABLE FOREST W. HANNA, JUDGE

Before Clark, Chief Judge Presiding, Nugent and Gaitan, JJ.

This appeal by 4550 Main Associates is from a judgment entered on a jury verdict finding the Kansas City Area Transportation Authority (ATA), to be the owner of a railroad right-of-way along an eight mile corridor, one segment of which crosses appellant's land. The judgment also operated to eject appellant from the property

and to enjoin future trespass. The disposition mooted appellant's counterclaims for rents and incidental relief. This appeal followed.

The right-of-way easement here in controversy has spawned extensive litigation and generated in this case 800 pages of trial transcript. Appellant presents fifteen points of error and the parties have filed 195 pages of briefs and argument. The pivotal issue, however, is readily identified as turning on the question of whether the claimed right-of-way has in fact been abandoned for railroad use and thus lost to those claiming the easement. Four of appellant's points deal with this question and urge that appellant was entitled to a directed verdict because abandonment in fact had been established and ATA was estopped to claim otherwise. The contention is dispositive of the case, but must be preceded by a recitation of some background detail.

HISTORY OF THE COUNTRY CLUB RIGHT-OF-WAY

Records of deeds and other documents introduced in evidence show the right-of-way in issue to have originated in 1873 by a conveyance to the Kansas City, Memphis and Mobile Railroad Company. The property was described as a strip of land fifty feet on each side of the center line of a railroad "as the same is or may be located." In 1926, the right-of-way was acquired by the Kansas City Public Service Company and later by Kansas City Transit, both being municipally franchised street car and bus companies providing local passenger service.

In 1962, when use of street cars had ended in Kansas City, thereby making a rail line surplus to the municipal

transit company, the right-of-way was sold and assigned to parties named Ashley. During the six years which followed, the Ashleys continued a rail freight operation, previously offered by the municipal transit company as an adjunct to its passenger service. The freight service moved rail cars to and from mercantile businesses along the route providing connections to other carriers at either end of the route. The freight service provided by the Ashleys ended in 1968 and was never resumed. No rail traffic along the route has moved since that date and no customer demand for the service has existed.

The subject right-of-way is frequently referred to as the Country Club line. This name stems from the route designation of the street car service which formerly used the track in municipal transit service. Under Ashley ownership of the right-of-way, the freight transport business was referred to as the Kansas City Public Service Freight Operation, apparently a partnership. That entity held a certificate from the Interstate Commerce Commission as an interstate common carrier and served customers along the right-of-way by delivering and picking up freight which was interchanged with other rail carriers coming from or destined to shippers throughout the country. When the Ashleys ended rail service in 1968, they gave notice to the Interstate Commerce Commission that service on the line was "embargoed." Such notice indicates that the certificated carrier will no longer accept freight for delivery along the embargoed route. Customarily, an embargo indicates a temporary suspension of service attributable to conditions beyond the carrier's control.

The Country Club railroad line continued under embargo status from 1968 until 1981 when the ICC issued

its certificate of abandonment. During the period of embargo, the Ashleys removed sections of the track, paved over areas of the right-of-way for use as automobile parking lots and leased locations where advertising billboards were erected.

The ATA is a bistate transit authority which operates buses in the greater Kansas City vicinity. It has long had the objective of acquiring the Country Club line for future development of mass transit. In 1970, after attempts to negotiate a purchase of the right-of-way from the Ashleys had failed, the ATA brought proceedings to take the property by condemnation. A jury awarded compensation to the Ashleys, the money was paid and the ATA took possession, but on appeal, the Missouri Supreme Court ruled that a right-of-way held under certification of an interstate common carrier by the Interstate Commerce Commission was under the exclusive jurisdiction of the Commission and could not be condemned under state law. *Kansas City Area Transportation Authority v. Ashley*, 555 S.W.2d 9, 10 (Mo. banc 1977). The property was thereby restored to the Ashleys under their claim to ownership of the easement.

Despite the absence of any use of the right-of-way for railroad purposes since 1968, the certificate of public convenience and necessity issued to the Ashleys by the ICC remained in effect after 1968 continuing jurisdiction over the route in the Commission, as the Supreme Court opinion cited above recognized. To remove this impediment to condemnation, the ATA instituted proceedings before the Commission in 1980 to decertify the route. These proceedings before the Interstate Commerce Commission will be described below in detail. It suffices for this summary to say that a finding

of abandonment in fact was made by the Commission sustaining the ATA contention that the Ashleys had neither the capability nor intent to resume rail service along the route of the right-of-way easement.

As a final development in history of the Country Club right-of-way, on October 27, 1981, the Ashleys agreed with the ATA upon terms of sale and sold to the ATA their interest in the right-of-way. The claim which the ATA asserts in this suit is based on that transaction.

NATURE OF PROPERTY RIGHT AT ISSUE

Before proceeding to a discussion of the issues presented to the trial court, it is necessary to define the interest in real estate represented by the Country Club right-of-way.

As was noted in the previous section of this opinion, the first record of ownership in the right-of-way appears in a deed from Wyatt and Mary Webb to the Kansas City, Memphis and Mobile Railroad Company. The deed recited a valuable consideration and contained no restrictions on the use of the property or limitation on the quantum of title transferred. It may therefore be assumed that the grantee acquired a fee simple estate, *Nigro v. Ashley*, 690 S.W.2d 410, 417 (Mo. App. 1984), if the description of where the railroad was situated could be supplied. The Kansas City, Memphis and Mobile Railroad did not, however, survive. It entered bankruptcy and on a sale of the assets by the bankruptcy trustee, the interest in the right-of-way was conveyed to James I. Brooks on December 15, 1879.

It is not shown in this record whether the Kansas City, Memphis and Mobile Railroad was ever built or

what use, if any, was made of the right-of-way by the grantee, Brooks. Moreover, the chain of title ends with the conveyance to Brooks. No deed from Brooks appears and there is no record in Jackson County of any administration on his estate. There is no title record on the property for the next twenty-two years.

On October 4, 1901, parties named William and Alice Reid, who were then strangers to the record title, executed a quit-claim deed to the right-of-way in favor of E.E. Rankin who then conveyed on the following day to Winner Real Estate Company, that by warranty deed. In 1907, Winner Real Estate conveyed to the Kansas City and Westport Belt Railway Company but, as evidenced by the record of proceedings in the United States District Court, that railroad suffered judicial foreclosure and the right-of-way was sold by a trustee to the Kansas City Railways Company, a predecessor to the Kansas City Public Service Co.

Although the ATA and their grantors, the Ashleys, trace an unbroken chain of title to William and Alice Reid, grantors in the earliest recorded deed subsequent to the conveyance to James I. Brooks in 1879, there has been no showing of any title in the Reids and therefore the conveyances which depended on the Reids' ownership could not have transferred title. No valid alternate basis has been proposed to support a claim that the Reids owned any estate in the right-of-way[1] and no evidence was pre-

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1. The ATA does argue that because the deed from Winner Real Estate announced Winner to be the owner of an estate in fee, title was thereby shown under the "ancient documents" rule. That rule is one of evidence which sanctions the proof of facts by documents otherwise not admissible to prove the statements because amounting to hearsay. The estate in real estate is not a fact to be proved by a deed recitation. Moreover, the issue here is not the title held by Winner, but that owned by the Reids.

sented to support any contention that the Reids had acquired title under any hypothesis.

Throughout the period commencing with acquisition of the right-of-way by the Kansas City Railways Company in 1916, it appears that the right-of-way was continuously used for transport of passengers or freight or both by rail until the Ashley embargo in 1968. That usage was obviously sufficient to create an easement by prescription, but by the very nature of the use for railroad purposes, the parties in interest are precluded from claiming acquisition of fee title by adverse possession. Indeed, no such claim is or has been made here by the ATA.

In light of the foregoing, the subsequent discussion in this opinion will proceed on the premise that the property interest owned by the Ashleys was an easement for a railroad right-of-way acquired by prescription and not a fee estate in the land.

ISSUES PRESENTED BY THE PLEADINGS, SUBMISSION AND JUDGMENT

Appellant is the owner of certain real estate improved with commercial structures located on the west side of Main Street in Kansas City. The Country Club right-of-way runs in a diagonal direction along the west or rear of appellant's land. According to the ATA petition filed in this case, appellant has been occupying that portion of the claimed right-of-way bounded by a projection of appellant's side property lines in a westerly direction and has built structures on the right-of-way and has used the ground for automobile parking and ingress to and egress from the rear of appellant's building. The petition sought

a judgment that appellant be ejected from the right-of-way and that ATA be declared the owner.

By its anwers, appellant generally denied ATA's claims of ownership and affirmatively alleged that the easement formerly burdening its fee interest had terminated by abandonment. Appellant also asserted counterclaims which asked for an accounting for rents and profits derived by ATA and for damages.

The submission to the jury was upon instructions which required a finding in favor of ATA unless the jury believed appellant had proved its claim of abandonment. Consideration of appellant's claim for damages was, of course, conditioned on proof of abandonment. The jury found in favor of ATA and the court entered judgment which also described the railroad right-of-way and ATA's ownership of the easement.

THE ICC PROCEEDINGS

ATA compiled for purposes of this suit a record of the ICC proceedings designated plaintiff's exhibits 17 and 18. The parties stipulated at trial to the authenticity of the exhibits. One of the issues on this appeal is the ruling of the trial court which precluded appellant from reading portions of this record to the jury. Admission of exhibits 17 and 18 into evidence in their entirety is not an issue on this appeal because we judicially notice this stipulated record. This we do because, unlike decisions of state administrative agencies, the orders, regulations and decisions of the Interstate Commerce Commission, and other federal regulatory agencies, are made pursuant to federal statutes and have the force of law. *Hiatt v. Wabash Ry.*, 69 S.W.2d 627, 630 (Mo. 1933);

Insurance Co. of the State of Pennsylvania v. West Plains Air, Inc., 637 S.W.2d 444, 446 (Mo. App. 1982).

The Interstate Commerce Commission records contained in plaintiff's exhibits 17 and 18 reveal the following: Proceedings applicable to the entire Country Club certificated route and the abandonment of service were initiated by an application filed by ATA on October 13, 1980. The filing was entitled "Application For Certificate Of Public Convenience And Necessity Permitting Abandonment Of Railroad." Among the allegations in the application, verified on oath of the ATA's agent, the application set out:

> "(1) The present physical condition of the Country Club Right-of-way is such that it is totally unusuable for railroad operations. It has been fenced off, leased out for parking purposes, paved over and generally allowed to fall into a state of disrepair that would not permit railroad traffic.
>
> (2) Applicant states that even if the necessary rehabilitation is performed, the line could not be operated properly since there are no longer any customers for rail service on this line."

The application sought approval by the ICC of the abandonment of the trackage and right-of-way as a certificated common carrier route, thereby removing that obstacle to condemnation of the Ashleys' interest. The Ashleys opposed the application thus framing an adversarial contest over the issue of whether past non-use of the right-of-way and the absence of any prospect for reinstitution of service warranted a declaration of abandonment.

The decision on the application by ATA for abandonment of the Country Club right-of-way was rendered by

the ICC on August 19, 1981 and a certificate and decision in amended form were issued September 11, 1981 and served September 28, 1981. The decision sustained the applications for abandonment and recited the following findings of fact material to this case:

> "The record leaves no doubt that a *de facto* abandonment of the Freight Operation line has taken place. No rail service or recognizable rail track maintenance has taken place since September of 1968. Nor has there been any serious effort on the part of Freight Operation to solicit traffic or reinstate rail service. Indeed, the current use of the rail line for parking lot and billboard purposes is totally unrelated to the carrier's obligation to perform rail service." (Emphasis in original).

The decision also stated:

> "Although it is true that the grant of an abandonment application is permissive and the railroad can choose not to surrender its common carrier status and obligations, a certificate of abandonment is evidence in any court proceeding that the line is not required by the public for rail operations. AB-71 (sub-No. 1), *Anne Arundel County and the City of Annapolis - Abandonment over the Baltimore and Annapolis Railroad Company from Glen Burnie to the City of Annapolis* (not printed), decided February 27, 1980."

The Ashleys filed a petition for administrative review of the August 19, 1981 decision pursuant to 49 C.F.R. § 1100.98(c)(1) contending, among other points, that the Commission had erred in its finding of de facto abandonment. The Ashleys argued that they had no intent to abandon but had always evidenced the purpose of pre-

serving the line for future use. The ATA presented suggestions opposing the petition for review and argued the Ashleys' contention that they had no intention to abandon was "whimsical." The Commission denied the application for administrative review.

The next event occurred, as noted above, when ATA and the Ashleys agreed October 27, 1981 on a sale of the right-of-way. ATA sought at the same time to withdraw its previous application for abandonment filed with the ICC and to strike the August 19 and September 28 decisions. As the ATA motions announced, the ATA was concerned that the abandonment certificate issued by the ICC could be used by private parties as a basis for arguing that cessation of rail operations by the carrier, the Ashleys, after abandonment had been declared would terminate the right-of-way easement. The ATA request to withdraw the abandonment application and motion to strike were summarily denied by the Commission October 30, 1981.

At the final proceedings before the ICC recorded in the exhibits, the ATA and the Ashleys filed a joint petition December 22, 1981 requesting that the case be reopened for the purpose of imposing a 90 day expiration date on the certificate of abandonment. The effect of such a modification in the decision would be to expunge the certificate if the carrier did not exercise the option to abandon within the stated period. Among the reasons offered by ATA and the Ashleys for an amended decision which would cause the certificate of abandonment to expire was the concern that the ICC decision could be used by abutting property owners to contend that under state law, the right-of-way easement had terminated by abandonment. The ICC entered its decision on March 18, 1982 denying the joint petition and stated in part:

"In the face of no rail operations over the subject line in the past twelve years nor any reasonable attempt to provide rail service, it was apparent that a continuation of our (ICC) jurisdiction over the line was neither necessary nor desirable. For this reason, the abandonment authorization issued in our decision served August 21, 1981, imposed no time limitation upon the authority granted. The intent of the August 21, 1981 decision to impose no time limitation upon the abandonment authorization was properly reflected in the certificate of abandonment issued November 2, 1981.

Petitioners' concern over the potential for litigation arising out of conflicting claims to the subject right-of-way are directed at issues relating to real property rights. Such matters are not properly within the purview of this Commission but fall with the exclusive jurisdiction of the State in which the property is located."

COLLATERAL ESTOPPEL AND THE ISSUE OF ABANDONMENT

The primary, if not exclusive, defense to the ATA petition in ejectment was appellant's claim that ATA acquired no property interest in the right-of-way because the Ashleys had abandoned the operation of a railroad prior to any assignment or attempted assignment of the easement to the ATA and that there were no easement rights to transfer. Apart from the facts evidencing abandonment, the cessation of all rail service, removal of tracks and use of the property for parking lots and billboards, appellant moved for judgment in its favor based on the

doctrine of collateral estoppel resulting from the ICC proceedings. This contention was rejected by the trial court and in points presented on this appeal, appellant argues that a failure to render judgment in its favor based on estoppel was error.

Beyond question, a critical issue in the case was whether the Ashleys had abandoned the use of the Country Club right-of-way for the purposes it was established and, in consequence, whether any property rights remained which could be sold and conveyed to ATA. Appellant argued at trial and reasserts here that ATA was collaterally estopped from asserting there had not been an abandonment because ATA sought and received from the Interstate Commerce Commission a decision that abandonment had occurred.

Collateral estoppel, also described as issue preclusion, prevents the same party from relitigating issues which have been previously adjudicated. There is no requirement of mutuality of estoppel and a stranger to the prior suit may assert collateral estoppel against a party to a prior suit to bar relitigation of issues already decided. *Oates v. Safeco Insurance Co. of America,* 583 S.W.2d 713, 719 (Mo. banc 1979). The nature of collateral estoppel is such that a fact appropriately determined in one lawsuit is given effect in another case involving different issues. *Hudson v. Carr,* 668 S.W.2d 68, 70 (Mo. banc 1984). To invoke the doctrine of collateral estoppel, four elements must be present: (1) the issue decided in the prior litigation is identical with the issue in the present action; (2) the prior adjudication resulted in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party or in privity with the party to the prior adjudication, and; (4) the party against

whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *Lewis v. Barnes Hospital,* 685 S.W.2d 591, 594 (Mo. App. 1985).

In this case and in the case before the ICC, it is apparent that elements (3) and (4) above are satisfied. ATA was the moving party before the ICC and is the party against whom the estoppel is asserted. There was a full and fair opportunity for ATA to assert its position as evidenced by the ICC decision in favor of the result ATA sought. As to element (2), an adjudication on the merits, ATA does not make any contention here that the ICC decision was not equivalent to a judgment. The proceeding was adversary in character and matured after post-decision motions to a non-appealable result. The authorities previously cited indicate that the ICC decision has the force and effect of federal law. No reason appears why, for purposes of estoppel, the decision should not be equated with a judgment on the merits. This leaves element (1), the identity of issues, which requires further discussion.

The ICC decision may be invoked for estoppel purposes only if abandonment for ICC decertification of common carriers rests on the same factual grounds and upon the same principles of law as does abandonment of a railroad right-of-way easement under Missouri property law. We look first to Missouri property law.

Abandonment is one of the recognized methods of terminating or extinguishing an easement and is complete when the privilege of use authorized by the easement wholly and permanently ceases. *Eureka Real Estate & Investment Co. v. Southern Real Estate & Financial Co.,* 200 S.W.2d 328, 331 (Mo. 1947).

Mere non-user of an easement will not extinguish the easement unless accompanied by an intention on the part of the owner of the dominant estate to abandon it. There must be an intention to abandon without an intention to again repossess it. *Hatton v. Kansas City, C & S Ry.*, 162 S.W. 227, 232 (Mo. 1913). The doctrine of abandonment will in some cases operate against railroads. *St. Louis-San Francisco Ry. v. Dillard*, 43 S.W.2d 1034, 1038 (Mo. 1931). When a railroad ceases to use for railroad purposes property over which it has an easement, the original owners or their grantees thereafter hold the property free from the burden of the easement. *G.M. Morris Boat Co. v. Bishop*, 631 S.W.2d 84, 88 (Mo. App. 1982). Some Missouri cases dealing generally with abandonment of easements refer to relinquishment of possession as a necessary element of abandonment. In the case of railroads, however, an easement for a railroad right-of-way is extinguished when the railroad ceases to run trains over the land. *Schuermann Enterprises, Inc. v. St. Louis County*, 436 S.W.2d 666, 668 (Mo. 1969). The test for abandonment of an easement under Missouri law is, therefore, non-user of the easement accompanied by conduct indicating an intention to abandon.

Federal case law announced in decisions considering abandonment in the setting of Interstate Commerce Commission certification of rail service applies a standard identical to Missouri law. In *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 313 (1981), the court observes in a footnote: "An abandonment is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line," citing *ICC v. Chicago & North Western Transportation Co.*, 533 F.2d 1025, 1028

(8th Cir. 1976). Also cited is *ICC v. Chicago, Rock Island & Pacific R.R.*, 501 F.2d 908, 911 (8th Cir. 1974) where it is said that abandonment implies an intention to indefinitely or permanently cease all service and factually, determination of the question revolves around the intent of the railroad.

It follows from a comparison of federal and Missouri law applicable to abandonment of a right-of-way by a railroad that the Interstate Commerce Commission, in reaching its decision that the Ashleys had abandoned the Country Club line, applied the same law as is controlling in the present case. Despite the protestations by the Ashleys that they were holding possession of the right-of-way for some future railroad use, the undisputed evidence was that no such use was realistically in prospect and the property was in fact being used for purposes totally unrelated to a railway operation. The actual conduct by the Ashleys was, and for some years had been, consistent only with an intent to cease indefinitely all use of the easement for a railroad.

The result reached by the Interstate Commerce Commission and advocated by the ATA is binding on the ATA under the doctrine of collateral estoppel. All of the elements of collateral estoppel are present. The ATA is not to be heard in this case to assert a claim diametrically opposed to that which it presented to the Interstate Commerce Commission merely because in the setting of this proceeding, its interests have changed. The record was sufficient to support a finding of abandonment in fact and the trial court was in error in failing to sustain appellant's motion for judgment on grounds of estoppel.

The ATA argues that appellant was properly denied the benefit of collateral estoppel associated with the ICC

decision first, because abandonment could only mature under ICC procedure at the election of the Ashleys and not by the decision itself, and second, because on the effective date of the decision, November 2, 1981, the Ashleys could not make the election, having sold the right-of-way to the ATA six days earlier. This argument fails to recognize the distinction between abandonment of the right-of-way in fact for purposes of the property easement and abandonment of status as an ICC certificated carrier.

It is correct that an ICC certificate of abandonment is permissive in that the carrier may elect to resume service and retain certificated status or may accept the option of abandonment.[2] In this case, the Ashleys did elect to abandon by concluding the sale of all the railroad property to the ATA. Quite obviously, the Ashleys foreclosed any possibility of electing to resume service over the line as a certificated common carrier when they divested themselves of the physical properties. The sale itself was a conclusive indicia of abandonment on the part of the Ashleys. *Seventy-Ninth Street Improvement Corp. v. Ashley*, 509 S.W.2d 121, 123 (Mo. 1974); *Concord Township v. United States*, 625 F.2d 1068, 1072 (3rd Cir. 1980).

The associated contention that abandonment could not have occurred until November 2, 1981, the effective date of the ICC decision, would be relevant only if this

---

2. The carrier is effectively put to the choice by issuance of the certificate of abandonment. In the event the carrier does not abandon certification but also does not resume service, the ICC may, for the benefit of shippers, obtain injunctive relief compelling the carrier to provide service. *ICC v. Chicago & N.W. Transp. Co., supra.*

case presented a question of jurisdiction as did the previous case of *Kansas City Area Transportation Authority v. Ashley, supra.* Had the ATA again undertaken to condemn the Ashleys' interest, it could well have been argued that ICC jurisdiction continued to prevent intrusion of state authority to condemn until ICC jurisdiction was finally surrendered. Here, however, the very transaction upon which the ATA relies for its claim to the easement, the sale by the Ashleys, has validity only if the Ashleys were free to dispose of the route without hindrance by the ICC.

It is significant in evaluating the ATA contention to note that the sale to the ATA made no pretense or attempt to assign the ICC route certification and ATA advances no claim to standing in its action here as an interstate carrier, nor could it. Certification of any carrier by the ICC over the Country Club route was precluded once the Commission found there was no public need for service. Moreover, the ATA's professed intention to use the route at some future date for light rail transit involves an activity not subject to ICC regulation and therefore a certificate of public convenience and necessity is not a subject in which the ATA has any legitimate interest. In sum, the only significance of the six day period between October 27, 1981 and November 2, 1981 was the theoretical obligation of the Ashleys as certificate holders to provide freight service and a corresponding restriction on their entitlement to dispose of the route. Only the ICC or freight customers would have any standing to complain that the Ashleys had transferred their interests to ATA before the certification of abandonment was final. No such claims have been made and the ATA is in no position to do so.

ABANDONMENT OF THE EASEMENT AS AN UNCONTESTED FACT

Apart from the bar of collateral estoppel, it also appears the evidence in the case established conclusively that the Ashleys had in fact abandoned the easement for railroad use long prior to the sale to the ATA and the issue was therefore not for decision by the jury. This contention is presented by appellant in Point V of its brief.

The facts on this subject, discussed earlier in this opinion, were not the subject of any dispute. No railroad cars or locomotives had been operated on the Country Club line for more than twelve years before the purported sale of the right-of-way to the ATA. There were no customers for rail freight service, the prior service had been discontinued indefinitely and the Ashleys had no plans to resume service. Some sections of the trackage had been removed, parking lots and billboards had been installed on the right-of-way and in consequence, the continuity of the route had been interrupted so that trains could not be run. The sole sources of income from the right-of-way to the Ashleys between 1968 and 1981 were from non-railroad uses including automobile parking lot fees and billboard rentals.

The authorities previously cited, *St. Louis-San Francisco Ry. v. Dillard, supra;* and *Schuermann Enterprises, Inc. v. St. Louis County, supra,* establish that when an easement is created for a rail line, that easement terminates and the abutting property owners are freed from the burden of the easement once the holder of the easement ceases using the property for railroad purposes. Abandonment of the easement is a necessary consequence

when trains no longer are operated over the land on which the easement is claimed. An intention to abandon is inferred by the discontinuance of rail service with no prospect for resumption of service.

The basis on which the Ashleys claimed to have retained the right-of-way easement, despite twelve years during which no rail operations were conducted, was an indefinite prospect that the right-of-way could be used at some uncertain future date for mass rail transit. James G. Ashley, Jr. in his own testimony acknowledged he had no capability to establish such a service, that mass rail transit had not been a feasible use of the property between 1968 and 1981, that it was not a practical project as of the date of trial and might never be.

The evidence in this case, summarized above, established conclusively that the Ashleys had abandoned the right-of-way for railroad uses, despite their continued possession and use of the property for rental income, and the trial court therefore erred in submitting the issue of abandonment to the jury.

UNRESOLVED ISSUES

The conclusion that the right-of-way easement had been lost by abandonment and did not constitute a property interest in real estate which could be transferred to the ATA by the Ashleys necessitates reversal of the trial court judgment, but does not conclude the case. As was noted earlier, appellant asserted counterclaims against the ATA based on the contention that use of the segment of the purported easement abutting appellant's unburdened fee was wrongful and ATA should account for any rents and profits derived therefrom. Reversal of the judgment

in favor of the ATA on its claim to the easement necessarily revives the counterclaims.

Appellant's counterclaims were pleaded in four counts, accounting, conversion, conspiracy and constructive trust, the conversion count being based on an allegation of a confederation between ATA and the Ashleys in designing the sale contract of October 27, 1981. The conversion count was distinguishable only in its prayer for punitive damages. At the close of appellant's evidence, the court sustained a motion to dismiss the conspiracy count and also sustained a motion for judgment in favor of ATA on appellant's claim for punitive damages. The submission, as best the trial record can be construed without a formal judgment entry on the counterclaims, was for a recovery of appellant's actual damages based either on an accounting or on conversion.

Appellant is entitled to an assessment of damages by a jury on one or more of the theories pleaded, although the counterclaim also presents some claims of an equitable nature tryable to the court. The case must therefore be remanded for disposition of the counterclaims in present or amended form consistent with the relief appellant may ultimately choose.

The judgment in favor of Kansas City Area Transportation Authority on its petition for ejectment and declaration of ownership in the right-of-way is reversed and the case is remanded for trial of the counterclaims by 4550 Main Associates, Inc.

All concur.

.....

Donald B. Clark,
Chief Judge Presiding

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KANSAS CITY AREA TRANSPORTATION AUTHORITY, Respondent,	)	No. WD 37,398
VS. (JACKSON) 4550 MAIN ASSOCIATES, INC., et al., Appellants.	)	Circuit Court 83-14703

ORDER

NOW it appearing to this Court that on September 4, 1987, the Missouri Supreme Court issued an order re-transferring the above-styled cause to this Court, and being fully advised in the premises,

IT IS ORDERED that the opinion written by Judge Donald B. Clark and adopted and filed by this Court on November 12, 1986 and modified on February 3, 1987, be and it is hereby readopted as the opinion of this Court and that the mandate of this Court be issued forthwith accordingly.

Dated this 16 day of September, 1987.

/s/ Don W. Kennedy
Don W. Kennedy,
Chief Judge

cc: Mr. William S. Nixon
Mr. James G. Lindquist

APPENDIX C

SUPREME COURT OF MISSOURI
EN BANC

September 4, 1987

KANSAS CITY AREA TRANSPORTATION AUTHORITY, Respondent,	)	
vs.	)	No. 69136
4550 MAIN ASSOCIATES, INC., et al., Appellants.	)	WD #37398

ORDER

Retransferred to the Missouri Court of Appeals - Western District.

Day - to - Day

/s/ William H. Billings
William H. Billings,
Chief Justice

STATE OF MISSOURI—SCT.:

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the 4th day of September 1987 as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said

Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 4th day of September, 1987.

/s/ Thomas F. Simon
Clerk.

/s/ Mary Elizabeth McHaney,
D. C.

APPENDIX D

49 U.S.C. §§ 10903, 10906

§ 10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(b)(1) Subject to sections 10904-10906 of this title, if the Commission—

(A) finds public convenience and necessity, it shall—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions that the Commission finds are required by public convenience and necessity; or

(B) fails to find public convenience and necessity, it shall deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 405(b) of the Rail Passenger Service Act (45 U.S.C. 565(b)).

(c) Repealed. Pub.L. 96-448, Title IV, § 402(a)(2), Oct. 14, 1980, 94 Stat. 1941.

§ 10906. Offering abandoned rail properties for sale for public purposes

When the Interstate Commerce Commission finds under section 10903 of this title that the present or future public convenience and necessity require or permit abandonment or discontinuance, the Commission shall find further whether the rail properties that are involved in the proposed abandonment or discontinuance are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

(2)

Supreme Court, U.S.
FILED
JAN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-954

In the Supreme Court of the United States

OCTOBER TERM, 1987

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

vs.

4550 MAIN ASSOCIATES, A PARTNERSHIP, FRANK S. JENNINGS

and

FRED E. CULVER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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73pp

QUESTION PRESENTED

Respondent submits that there is no federal question presented in this case to act as a basis for jurisdiction in this Court. The Missouri Courts have not rendered a decision construing a federal statute or which deals with issues under the jurisdiction of the Interstate Commerce Commission. The Missouri Courts have merely given effect to the decisions of the Interstate Commerce Commission under the doctrine of collateral estoppel and principles of Missouri State Law. Petitioner, KCATA, alleged and proved abandonment in the Interstate Commerce Commission, winning a decision that abandonment of the use of the railroad right-of-way easement had occurred. The Missouri Courts have merely ruled that Petitioner cannot re-litigate the issue of abandonment in the Missouri Courts in hope of obtaining a different result now that KCATA's interests and goals have changed from those advocated in the Interstate Commerce Commission proceedings.

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No. 87-954

In the Supreme Court of the United States

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KANSAS CITY AREA TRANSPORTATION AUTHORITY,
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4550 MAIN ASSOCIATES, A PARTNERSHIP, FRANK S. JENNINGS

and

FRED E. CULVER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

Respondents, 4550 Main Associates, A Partnership, Frank S. Jennings and Fred E. Culver, and each of them, pray this Court enter its Order denying Petitioner, Kansas City Area Transportation Authority's (KCATA) Petition for Writ of Certiorari to the Missouri Court of Appeals - Western District.

JURISDICTION

There is no jurisdiction in this Court to grant Petitioner's Petition for Writ of Certiorari to the Missouri Court of Appeals - Western District for the reason that the decision of the Missouri Court does not rule on, construe or address the validity of a treaty or statute of the United States. The decision of the Missouri Court does not draw into question the validity of a state statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States. The decision of the Missouri Court does not rule on, construe or address a right, privilege or immunity claimed under the Constitution, treaties, or statutes of, or commission held or exercised under, the United States. There is therefore, no jurisdiction for review by this Court under 28 U.S.C. Section 1257 (3), which is the basis for jurisdiction alleged by Petitioner.

The decision of the Missouri Court is not a final judgment or decree rendered by the highest court of Missouri as required by 28 U.S.C. Section 1257. Clearly the case has been remanded by the Missouri Court of Appeals to the trial court for retrial of Respondents' Counterclaims. Until all of the claims of the parties have been tried and the Missouri appellate procedure exhausted a final judgment does not exist, as required by 28 U.S.C. Section 1257. Review jurisdiction does not arise in this Court until the state court decision is final.

STATEMENT OF THE CASE

This case was initiated in the Missouri Courts to resolve a dispute between the parties on issues of real property ownership and use of the real property that was formerly part of Country Club Railroad Right-Of-Way Easement.

Petitioner, KCATA, filed a suit in the Circuit Court of Jackson County, Missouri, seeking to eject Respondents from the property and remove a structure that had been erected by Respondents. Respondents filed their Answer and Counterclaims asserting that Respondents were owners of the property free from the burdens of the railroad right-of-way easement. The case was presented to the trial court as an ownership dispute that also included various claims by Respondents that they were entitled to actual and punitive damages from KCATA for conspiracy to deprive Respondents of the ownership and use of the land and for certain other relief not pertinent to this Petition for Writ of Certiorari.

The case was submitted to the trier of fact to determine ownership of the land under the law of the State of Missouri and for judgment on various of Respondents' counterclaims. A verdict was returned for KCATA. The trial court prohibited Respondents from introducing into evidence the Interstate Commerce Commission's findings and decisions, and denied Respondents' Motion for Directed Verdict on the ground KCATA was collaterally estopped by the Interstate Commerce Commission decision won by KCATA (see Appendix A), at the trial. The trial court entered judgment for KCATA.

Respondents appealed the judgment entered by the trial court on numerous grounds. Petitioner, KCATA, did not file a cross appeal claiming any error by the

trial court. Prior to KCATA filing this Petition for Writ of Certiorari, KCATA has not pursued an appeal claiming that the trial court erred in failing to grant a Motion for Summary Judgment or that the trial court erred in failing to submit an offered instruction. Those issues were not preserved for appeal by Petitioner. Those issues are asserted for the first time in this Court as a basis for claiming a federal question exists.

The Missouri Court of Appeals reversed the trial court's judgment that KCATA owned the right-of-way easement, ruling that Respondents were the owners of the land and that the right-of-way easement claimed by KCATA, had been extinguished by abandonment as determined by the Interstate Commerce Commission. (See Appendix A). The Court applied principles of state law in ruling that the Interstate Commerce Commission's decision collaterally estopped KCATA from re-litigating the question of abandonment. The Missouri Court of Appeals did not construe a federal statute or deal with a federal question in reaching its decision. The Missouri Court of Appeals took no action until after the Interstate Commerce Commission had relinquished its jurisdiction over the right-of-way easement and after the Interstate Commerce Commission had ruled that all claims of ownership and real property rights would have to be decided under Missouri State Law. (See Appendix A).

Petitioner makes reference to various rulings issued by the Interstate Commerce Commission in its statement of the case, asserting that the orders of the Interstate Commerce Commission form the basis for a federal question in this case. It should be noted that the Interstate Commerce Commission proceedings were unusual and recognized as such by the Interstate Commerce Commission in its decision dated August 19, 1981, to wit:

> "The situation presented here—where a rail line abandonment is sought by non-carrier applicants and opposed by the rail carrier—while uncommon, is not unique. See *Baltimore and Annapolis R. Co. Abandonment,* 348 I.C.C. 678, 704 (1976). Subject to establishing a proper interest in an abandonment proposal, any person may institute a proceeding for the issuance of a certificate of public convenience and necessity authorizing abandonment of a rail line. *Thompson v. Texas-Mexican R. Co.,* 328 U.S. 123 (1946).

and again in its decision dated October 31, 1981, to wit:

> This is an unusual proceeding because the moving parties are non-carriers and the carrier, which has not operated in over a dozen years, opposes abandonment. In our earlier decision we found that a *de facto* abandonment had in fact occurred and that we could not countenance Freight Operation's attempts to use our jurisdiction as a shield against State Law where there is no overriding Federal interest in interstate commerce.

KCATA initiated the proceedings before the Interstate Commerce Commission by filing a petition against the carrier, Kansas City Public Service Freight Operation, requesting the Interstate Commerce Commission to make a determination and finding that the actual use of the railroad right-of-way easement for railroad purposes had been abandoned, that the Interstate Commerce Commission should relinquish its jurisdiction over the right-of-way, and issue a Certificate of Abandonment, thereby permitting state law proceeding on the question of ownership. KCATA was successful and did prevail upon the Interstate Commerce Commission to rule that a factual

abandonment of the use of the railroad right-of-way for railroad purposes had occurred. The Interstate Commerce Commission did issue a Certificate of Abandonment, against the wishes of the carrier, Kansas City Public Service Freight Operation, and relinquish its jurisdiction over the right-of-way.

As a part of the Interstate Commerce Commission proceedings, KCATA argued successfully to the Interstate Commerce Commission that the carrier, Kansas City Public Service Freight Operation, had been attempting to use the jurisdiction of the Interstate Commerce Commission as a shield against the operation and effect Missouri Law relating to real property rights. The Interstate Commerce Commission recognized the carrier's ploy and refused to allow its jurisdiction to be used for that illegitimate purpose by the carrier, Kansas City Public Service Freight Operation, and ruled that a de facto abandonment of the use of the right-of-way had occurred.

KCATA and the carrier, Kansas City Public Service Freight Operation, both recognizing that under the law of Missouri, abutting landowners were the owners of abandoned railroad right-of-way easement, contracted with each other for a conveyance of the right-of-way easement to KCATA, in an attempt to defeat the ownership claims of abutting landowners to the right-of-way easement under Missouri Law. The conveyance was not intended to continue rail service subject to Interstate Commerce Commission's jurisdiction. KCATA and the carrier, Kansas City Public Service Freight Operation, both requested the Interstate Commerce Commission withdraw its Certificate of Abandonment, and dismiss the Interstate Commerce Commission proceedings in an attempt to avoid claims of ownership by adjoining land-

owners under state law. The Interstate Commerce Commission recognized this request as yet another ploy to use the Interstate Commerce Commission's jurisdiction as a shield against the operation of state law. The joint request of KCATA and the carrier, Kansas City Public Service Freight Operation, to have the Interstate Commerce Commission rescind its finding of de facto abandonment and its Certificate of Abandonment, effective November 2, 1981, was denied. (See Appendix A). On October 30, 1981, the Interstate Commerce Commission issued its corrected Certificate of Abandonment and Decision, deleting its prior finding that the right-of-way was suitable for alternative public uses, and removing the 180 day waiting period as a condition. The ICC ordered the Certificate effective on November 2, 1981. March 18, 1982, the Interstate Commerce Commission entered its order which succinctly addresses the conspiracy attempted by KCATA and the carrier, Kansas City Public Service Freight Operation, to use the Interstate Commerce Commission's jurisdiction as a shield against the application of Missouri State Law in resolving issues relating to real property rights, to wit:

> "The authorization of abandonment in this proceeding emphasized that we would not allow our jurisdiction to be used as a shield against the legitimate processes of State law where there existed no overriding Federal interest in interstate commerce. In the face of no rail operations over the subject line in the past twelve years nor any reasonable attempt to provide rail service, it was apparent that a continuation of our jurisdiction over the line was neither necessary nor desirable. For this reason the abandonment authorization issued in our decision served August 21, 1981, imposed no time limitation upon the authority granted. The intent of the August 21, 1981

decision to impose no time limitation upon the abandonment authorization was properly reflected in the certificate of abandonment issued November 2, 1981.

Petitioners' concern over the potential litigation arising out of conflicting claims to the subject right-of-way are directed at issues relating to real property rights. Such matters are not properly within the purview of this Commission but fall with the exclusive jurisdiction of the State in which the property is located."

The Missouri Court of Appeals - Western District decision applies principles of Missouri State Law to determine the real property interests of the parties. There is an adequate state ground for the decision of the Missouri Court of Appeals which is clearly delineated in the decision itself. The Missouri decision does not address or touch any issue pre-empted by federal law or subject to the Interstate Commerce Commission's jurisdiction.

REASONS FOR DENYING WRIT

I. The decision upon which Petitioner seeks a Writ of Certiorari is not a final order of the Missouri Courts under 28 U.S.C. 1257.

28 U.S.C. 1257 clearly delineates the circumstances in which this Court may review decisions of a State Court. 28 U.S.C. 1257 requires that there be a final judgment or decree before review is proper. A state court judgment that disposes of some issues, but remands the cause for a new trial, is not a final judgment, but is an interlocutory judgment, and not reviewable by the United States Supreme Court. *Urie v. Thompson*, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018 (1949).

The Missouri Court of Appeals has clearly remanded the cause to the trial court for trial of the counterclaims by Respondents. (Petitioner's Appendix A, p. A21). Clearly the decision of the Missouri Court of Appeals is not a final judgment and not subject to review by Writ of Certiorari under 28 U.S.C. 1257.

II. Petitioner failed to cross-appeal from the trial court judgment and cannot now attack the judgment to obtain a modification of the judgment in its favor by asserting error by the trial court or Missouri Court of Appeals on issues that were not preserved for appeal.

Petitioner asserts that a federal question was presented in the trial court by:

1. Motion for Summary Judgment; and
2. Submission of a proposed instruction that was refused by the trial court.

Petitioner did not timely file a Motion for Summary Judgment. The trial court entered a specific order relating to Petitioner's Motion for Summary Judgment. (Respondents' Appendix C, pp. A44-A45). The trial court specifically found that the Motion for Summary Judgment was not timely filed and would not be considered.

KCATA offered an oral instruction as contained in Respondents' Appendix D, p. A46. The trial transcript does not reflect that Petitioner submitted the instruction in the form claimed by KCATA, until after trial. (Respondents' Appendix D, pp. A48-A49). In any event, KCATA did not appeal from the refusal of the trial court to submit the instruction offered by KCATA and the Missouri Court of Appeals was not asked to address the failure of the trial court to submit the instruction.

KCATA filed no appeal of any kind from the trial court decision or rulings to the Missouri Court of Appeals alleging that the trial court had erred by not granting KCATA's Motion for Summary Judgment or in failing to submit KCATA's offered instruction. The issue was not presented to the Missouri Court of Appeals and was not considered by the Missouri Court of Appeals.

It is an "inveterate and certain" rule of law that a party who does not file a cross-appeal may not attack the decree with a view either to enlarging his own right or lessening the rights of his adversary. He may not correct an error or supplement the decree with respect to a matter not dealt with below. *Morley Construction Company v. Maryland Casualty Company,* 300 U.S. 185, 81 L.Ed. 593, 57 S.Ct. 505 (1937); *Massachusetts Mutual Life Insurance Company v. Ludwig,* 426 U.S. 479, 48 L.Ed.2d 784, 96 S.Ct. 2158 (1976).

The fact that KCATA did not appeal from the trial court's rejection of KCATA's contention that there was no abandonment as a matter of federal law, either on the ground that its Motion for Summary Judgment was improperly denied, or on the ground that an offered instruction was improperly refused by the trial court, acts as a waiver and abandonment of those contentions. *Penfield Company of California v. Securities & Exchange Commission,* 330 U.S. 585, 91 L.Ed. 1117, 67 S.Ct. 918, reh. den., 331 U.S. 865, 91 L.Ed. 1870, 67 S.Ct. 1301 (1947). The correctness of the decision of the trial court is presumed. *Field v. Barber Asphalt Paving Company,* 194 U.S. 618, 48 L.Ed. 1142, 24 S.Ct. 784 (1904).

Clearly, KCATA has not preserved for review the issue of whether or not KCATA was entitled to judgment

as a matter of federal law based on the Interstate Commerce Commission's Certificate of Abandonment. This Court should not grant review on that issue.

III. The decision of the Missouri Court of Appeals does not conflict with pre-emption of abandonment proceedings by the Interstate Commerce Act. The Missouri Court of Appeals did not apply state law to determine real property rights until after the Interstate Commerce Commission found a de facto abandonment of the railroad right-of-way easement had occurred, and until after an abandonment certificate was permitted by the Interstate Commerce Commission and until after the Interstate Commerce Commission relinquished its jurisdiction over the right-of-way.

The Interstate Commerce Commission conducted extensive proceedings with regard to the abandonment of the railroad right-of-way easement in question resulting in various decisions culminating in a Corrected Certificate of Abandonment which was entered by the Interstate Commerce Commission on October 30, 1981, to be effective on November 2, 1981. Those decisions are attached. (Respondents' Appendix A, pp. A35-A39). The corrected certificate of abandonment contained no conditions relating to acquisition by another party for public use and no time limitation on the effect of the abandonment certificate. The Interstate Commerce Commission clearly stated its intent concerning the language of the abandonment certificate in its March 18, 1982, decision as follows:

> "The authorization of abandonment in this proceeding emphasized that we would not allow our jurisdiction to be used as a shield against the legitimate processes of State law where there existed no

overriding Federal interest in interstate commerce. In the face of no rail operations over the subject line in the past twelve years nor any reasonable attempt to provide rail service, it was apparent that a continuation of our jurisdiction over the line was neither necessary nor desirable. For this reason the abandonment authorization issued in our decision served August 21, 1981, imposed no time limitation upon the authority granted. The intent of the August 21, 1981 decision to impose no time limitation upon the abandonment authorization was properly reflected in the certificate of abandonment issued November 2, 1981.

Petitioners' concern over the potential litigation arising out of conflicting claims to the subject right-of-way are directed at issues relating to real property rights. Such matters are not properly within the purview of this Commission but fall within the exclusive jurisdiction of the State in which the property is located."

The Interstate Commerce Commission brought its regulatory mission to an end by its Corrected Certificate of Abandonment entered October 30, 1981, which became effective November 2, 1981, and by its order of March 18, 1982, refusing to reopen the case. *Hayfield Northern Railroad Company, Inc. v. Chicago and Northwestern Transportation Company,* 467 U.S. 622, 81 L.Ed.2d 527, 104 S.Ct. 2610 (1984). The Courts of Missouri were then free to make application of Missouri law to determine the real property rights relating to the land underlying the right-of-way easement and the extinguishment of the easement.

The suit in the Missouri Court was filed August 2, 1983, one and three-fourths (3/4) years after the Inter-

state Commerce Commission relinquished jurisdiction over the railroad right-of-way easement. The issue of abandonment was clearly no longer a matter pre-empted by the Interstate Commerce Act. The Interstate Commerce Commission had already determined a de facto abandonment had occurred and relinquished its jurisdiction. *Chicago & N.W. Transportation Company v. Kalo Brick & Tile,* 450 U.S. 311, 67 L.Ed.2d 258, 101 S.Ct. 1124 (1980). The issue relating to real property rights was an issue to be determined under state law principles. *Modern Handcraft, Inc. - Abandonment in Jackson County, MO,* 363 ICC 969 (1981). (See Appendix A). The requirements of *Kansas City Area Transportation Authority v. Ashley,* 555 S.W.2d 9 (Mo. Banc 1977), cert. denied, 434 U.S. 1066, 55 L.Ed.2d 767, 98 S.Ct. 2143, had clearly been met.

The Missouri Court of Appeals merely applied the Missouri Law of collateral estoppel in arriving at its decision. The Missouri Court determined that the Interstate Commerce Commission had applied the same law in reaching its determination that a de facto abandonment had occurred as controlled the determination of abandonment under Missouri Law, The Missouri Court of Appeals simply confirmed abandonment of the right-of-way in fact and entered judgment fixing the property rights as between the parties. The Missouri Court of Appeals did not take this action until the Interstate Commerce Commission had first determined that a relinquishment of Interstate Commerce Commission jurisdiction was appropriate.

IV. The decision of the Missouri Court of Appeals does not contravene Congressional Intent, but does prevent the taking of Respondents' land without due process of law and preserve Respondents' right to equal protection of the law. The Missouri decision preserves the real property rights of abutting landowners and does not permit those rights to be eroded under the guise of "preserving" the right-of-way for an indefinite prospect that at some uncertain future date light rail mass transit may become feasible, when the evidence at trial was that such a use had never been feasible, was not feasible at the time of trial and may never be feasible.

KCATA requests this Court grant a Writ of Certiorari to preserve the railroad right-of-way for the alternative public purpose of establishing light rail mass transit on the right-of-way. KCATA relies on 49 U.S.C. 10906 in support of its position. It attempted to use the Interstate Commerce Commission's jurisdiction, a procedural matter, to avoid the true fact of abandonment and to avoid the application of state law.

This Court should be aware that extensive testimony was adduced at the trial of this case on the claim of KCATA that light rail mass transit was a real, viable alternative public use of the right-of-way. The Missouri Court of Appeals found the facts on light rail mass transit in its opinion, to wit:

> The basis on which the Ashleys claimed to have retained the right-of-way easement, despite twelve years during which no rail operations were conducted, was an indefinite prospect that the right-of-way could be used at some uncertain future date for mass rail transit. James G. Ashley, Jr., in his own testimony

> acknowledged he had no capability to establish such a service, that mass rail transit had not been a feasible use of the property between 1968 and 1981, that it was not a practical project as of the date of trial and might never be. (Petitioner's Appendix A, p. A20).

In addition, Richard F. Davis, C.E.O., of KCATA, confirmed that light rail mass transit was not presently, or reasonably foreseeable, feasible at the right-of-way in his testimony. (Respondents' Appendix E, pp. A50-A51).

The Certificate of Abandonment issued by the Interstate Commerce Commission on October 31, 1981, effective November 2, 1981, does not contain a finding that the right-of-way is suitable for alternative public purposes as required by 49 U.S.C. 10906. It does not impose a prohibition on disposal for 180 days after the effective date of the order, unless the properties have first been offered for sale for public purposes. Therefore, KCATA's claim that the Missouri Court of Appeals has acted contrary to 49 U.S.C. 10906 is without merit on its face.

Even if it is argued that the Certificate of Abandonment effective November 2, 1981, somehow incorporates provisions of prior decisions and orders of the Interstate Commerce Commission, and does contain a provision finding the right-of-way suitable for public purposes, the KCATA's attempted purchase is not consistent with the language or spirit of 49 U.S.C. 10906. The statute talks in terms of present, feasible, alternative public uses. It does not speak in terms of speculative future uses not presently feasible; or of uses not feasible in the foreseeable future, and arguably never to become feasible, as was found to be the facts concerning light rail mass transit on the right-of-way easement at the trial of this case.

The Railroad Revitalization Regulatory Reform Act of 1976, which contains 49 U.S.C. 10906, does not purport to transform a prescriptive easement under state law to a greater interest in real property free of the effect and application of state real property law. 49 U.S.C. 10906 does not pre-empt state title law. *McKinley v. Waterloo Railroad Company,* 368 N.W.2d 131 (Ia. 1965).

Clearly the Missouri Court of Appeals has done nothing more than apply the real property law of Missouri in reaching its decision. It has determined real property rights relating to ownership of the right-of-way based on the facts surrounding actual use of the right-of-way and principles of state law. It has not stepped into areas properly the subject matter of the Interstate Commerce Commission's jurisdiction. It has acted only after the Interstate Commerce Commission relinquished its jurisdiction and after the Interstate Commerce Commission referred the questions relating to real property interests to the Missouri Courts. It has entered its judgment which is consistent with the letter and spirit of 49 U.S.C. 10906, but it has not allowed the KCATA to further its conspiracy to deprive Respondents from ownership and use of their land free of the burdens of the easement without due process of law and without equal protection of the law. It has not allowed the carefully devised scheme of KCATA and its co-conspirators, based on form and not substance or fact, to succeed in depriving Respondents of their land. It has given effect to the letter and spirit of the Interstate Commerce Commission decision affecting the right-of-way. It has directed that Respondents have a new trial on its counterclaims. Clearly there is no federal question presented in this case.

CONCLUSION

There is no federal question to vest jurisdiction in this Court under 28 U.S.C. 1257.

A Writ of Certiorari should not be granted to review the judgment and opinion of the Missouri Court of Appeals - Western District, for the reasons that:

1) The stated basis for establishing federal question jurisdiction in this Court was not preserved by Petitioner for review because Petitioner filed no appeal asserting that the trial court erred.

2) The real property interests decided by the Missouri Court of Appeals are a matter of state law; not a federal question and not subject to Interstate Commerce Commission jurisdiction.

3) The Missouri Court of Appeals decision is not inconsistent with or contrary to federal law.

4) The Missouri Court of Appeals decision is not a final judgment subject to review by Writ of Certiorari.

Respectfully submitted,

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Attorneys for Respondents, 4550 Main Associates, A Partnership, Frank S. Jennings and Fred E. Culver

APPENDIX

APPENDIX A

INTERSTATE COMMERCE COMMISSION
Washington, D.C. 20423

I, JAMES H. BAYNE, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Decision, decided June 6, 1980 and served June 10, 1980

Decision, decided January 19, 1981 and served February 4, 1981

Decision, decided April 3, 1981 and served April 3, 1981

Decision, decided August 19, 1981 and served August 21, 1981

Certificate and Decision, decided September 11, 1981 and served September 16, 1981

Corrected Certificate and Decision, decided September 11, 1981 and served September 28, 1981

Decision, decided September 30, 1981 and served October 2, 1981

Corrected Certificate and Decision, decided October 30, 1981 and served November 2, 1981

Decision, decided March 18, 1982 and served March 24, 1982

issued to Modern Handcraft, Inc—Abandonment—In Jackson County, MO in Finance Docket No. 29330 et al, the original of which is on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 3rd day of April, A.D., 1985.

/s/ James H. Bayne
Secretary of the Interstate
Commerce Commission

(Service Date June 10, 1980)

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 29330F

MODERN HANDCRAFT, INC—ABANDONMENT—IN JACKSON COUNTY, MO

Decided: June 6, 1980

On April 17, 1980, Modern Handcraft, Inc. (Applicant) filed an application pursuant to 49 U.S.C. 10903 and by the Commission's Regulations Governing the Abandonment of Railroad Lines and Discontinuance of Service, 49 C.F.R. Part 1121 in which it seeks to have abandoned 422.08 feet of main line trackage which is owned by the Kansas City Public Service Freight Operation (KCPSFO) extending from the southern boundary of Westport Road in the City of Kansas City, Jackson County, MO.

Public notice of the abandonment application was served, posted and published by the applicant in accordance with the notice requirements set forth in Section 1121.30 of the Regulations. Subsequently, petitions to investigate the proposed abandonment was filed by the Kansas City Public Service Freight Operation, the Kansas City Area Transportation Authority (KCATA) and the City of Kansas City, MO.

The environment and energy impacts of this action have been examined and found not to be significant. Areas of consideration included, but were not limited to, energy consumption, air, water and noise pollution, and public safety. It was determined that the right-of-way would be

suitable for alternative public use following abandonment if the KCPSFO has saleable title to the property comprising the right-of-way.

The environmental document which supports these conclusions is available upon request to: Energy and Environment Branch, Room 5377, Interstate Commerce Commission, 12th and Constitution Avenue, N.W., Washington, DC 20423. Telephone: (202) 275-7392. Interested persons may comment on this matter by filing their statements in writing on or before the 40th day after the service date of this decision.

The application shall publish the above findings in the local newspaper of the area affected and certify to the Energy and Environment Branch that this has been accomplished within 3 weeks of the date of service of this decision.

It is ordered:

1. An investigation into the proposed abandonment is instituted.

2. The proposed effective date of the abandonment is postponed pending the investigation.

3. This proceeding will be handled under modified procedure, and the parties must comply with the applicable provisions of Section 1100.43(b), 1100.44(b) and 1100-45-1100.52 inclusive, of the General Rules of Practice except that the original and one copy of any statement made pursuant to Section 1100.51 shall be filed with the Commission.

4. By July 28, 1980, applicant must file verified statements in support of the application. Protestants must file verified statements in opposition to the application by

August 25, 1980, and applicant must file verified statements in reply by September 15, 1980.

5. Each statement filed with the Commission shall be certified to show that a copy has been served on all parties of record (shown in the appendix to this decision).

6. Except when good cause has been shown, preliminary motions and requests for cross-examination of witnesses or for other relief will not be acted upon prior to the date which all verified statements are required to be filed.

By the Commission, Gary J. Edles, Director, Office of Proceedings.

/s/ James H. Bayne
James H. Bayne
(SEAL) Acting Secretary

APPENDIX

Information which should be contained, in addition to all other information deemed relevant by Protestant, in protestant's verified statement:

1. Identification of protestant by name and address.

2. If protestant is a corporation, local or state entity, the name, title or position of officer or official filing protest shall be given.

3. A detailed statement of protestant's interest in the abandonment or discontinuance proceeding, identifying the locations and nature of protestant's business; whether protestant uses the involved service; and if it does not, information with respect to the group or public interest it represents.

4. If protestant is a shipper, detail information with respect to protestant's reliance on the service proposed to be abandoned including rail carload commodity group tonnage shipper or received at any station on the line in each of the last two calendar years and that part of the current year for which such information is available; and, protestant's tonnage shipped or received by other means of transportation including shipments by any alternate rail lines, reasons for shipping by such other means, and the detailed increased cost, if any, of such shipment over the cost of shipment by rail.

5. What other rail lines, if any, are located in the directly affected area. In the best judgment of protestant, what is the relationship of these other lines to the line proposed to be abandoned (i.e., only other line serving

area, interchange or connecting line, etc.) The ability of protestant to relocate or make use of such alternate rail line. If rail or non-rail alternatives are not available or suitable, state circumstances in detail.

6. If the protestant is a State or local entity, any local, regional or State-wide developmental plans for the directly affected area should be submitted and explained. Data which demonstrates the effects of the proposed abandonment upon the human environment and rural and community development should be submitted. Such data should include a detailed description of all transportation services (rail, motor, water, air) available to the affected communities including a detailed description of the nature of the operations and the highway network in the proximate area.

7. A narrative summary of reasons for opposing the abandonment.

8. If oral hearing is requested, state specifically what, if any, additional information would be presented.

Service Date
February 4, 1981

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 29330

MODERN HANDCRAFT, INC. - ABANDONMENT
IN JACKSON COUNTY, MO

Decided: January 19, 1981

By application filed April 17, 1980, Modern Handcraft, Inc. (Handcraft), a noncarrier, seeks a certificate of public convenience and necessity under 49 U.S.C. 10903 permitting abandonment of 422.08 feet of main line trackage adjacent to its property in Kansas City, Jackson County, MO, extending from the southern boundary of Westport Road 422.08 feet in a southeasterly direction. The 422.08 feet proposed for abandonment is the northernmost segment of an approximately 8 mile line of railroad located in Kansas City extending from Westport Road on the north to the vicinity of the intersection between U.S. Highway 71 and Prospect Street on the south owned by Kansas City Public Service Freight Operation (KCPSFO).

By decision served June 10, 1980, the Commission instituted an investigation into the proposed abandonment and directed that the proceeding be handled under modified procedure. Handcraft filed a verified statement and argument in support of the application. Verified statements and argument in opposition to the application were filed separately by KCPSFO, the City of Kansas City, MO (Kansas City), and the Kansas City Area Transportation Authority (KCATA), to which Handcraft filed a reply.

Subsequent to the due date for the filing of verified statements by protestants, KCATA by petition filed September 15, 1980, seeks leave to file an additional verified statement out of time. By the same pleading, KCATA moves to consolidate the subject abandonment proceeding with an abandonment proceeding that it was concurrently instituting (Finance Docket No. 29485) and to stay these proceedings pending a ruling on the motion to consolidate. Kansas City filed suggestions in support of the petition and motions of KCATA. In a pleading filed September 19, 1980, KCPSFO moves to quash KCATA's petition of September 15, 1980. KCATA filed suggestions in opposition to the motion to quash to which KCPSFO filed a reply. Handcraft filed a reply to the KCATA motion to consolidate indicating that it would not object to the consolidation of the proceedings.

Because the additional verified statement tendered out of time by KCATA in its September 15, 1980, pleading relates to, updates, and further clarifies the timely filed KCATA verified statement in opposition, we will accept the additional statement for filing. The KCATA motion to consolidate this proceeding with a proceeding about to be instituted and the related motion for stay are denied. At this time we find insufficient justification for delaying the disposition of the subject proceeding. To the extent that the KCPSFO motion to quash constitutes a reply to the KCATA additional verified statement, it will be recognized as part of the record. The motion to quash, however, is denied.

Handcraft has reason to believe that an authorization of abandonment of the subject 422.08 feet by the Commission would result in the property reverting to

it under Missouri law. It refers to two decisions by the Supreme Court of Missouri, *Seventy-Ninth Street Improvement Corp. v. Ashley,* 509 S.W. 2d 121, (1974), and *Kansas City Area Transp., Etc. v. Ashley,* 555 S.W. 2d 9, (1977), to support this position. Handcraft's purpose in filing this application is to obtain a Commission determination on the issue of abandonment so as to enable the Courts of Missouri to evaluate the title question and determine the ownership of the property.

Rail service over the subject line had been provided to Handcraft by KCPSFO until September 1968, when, with the permission of the Commission, KCPSFO embargoed rail service over its entire 8 mile line including the 422.08 feet subject to this proceeding. Since the date of the embargo, no rail service or maintenance has been performed on the line. Nor has any effort to continue railroad operations been made by KCPSFO. The 422.08 feet has been partially fenced off and is currently leased out for use as a parking lot.

KCPSFO maintains that it is an active railroad and has at no time indicated its intention to abandon the subject right-of-way. It contends that it has engaged in track work on the property sought to be abandoned but acknowledges that the property is currently licensed and used for parking purposes. KCPSFO has offered to sell its entire right-of-way including the segment which is the subject of this proceeding to KCATA for public use as a surface rail transit line. Protestant believes that its right-of-way should not be segmented but should be maintained in its entirety for transfer to the local authority planning to establish a mass transportation system. As applicant's abandonment proposal would cause a break in the right-of-way, protestant urges that it be denied.

Kansas City and KCATA point out that the subject 422.08 feet is part of the "Country Club Right-of-Way", a route which occupies a central position in planning for future mass transportation in the Kansas City metropolitan area. They fear that Commission approval of the proposed abandonment could cause a forfeiture of title complicating the question of ownership of the property and encouraging the construction of buildings on the right-of-way land. Kansas City and KCATA have been engaged in a series of efforts, extending back as far as 1959, to acquire the "Country Club Right-of-Way". To date these protestants have been unable to successfully negotiate an agreement of sale with KCPSFO or otherwise acquire the property by legal process. If abandonment is authorized, KCATA urges that the Commission direct that the subject right-of-way be transferred to it for use as a light rail transportation system.

The Commission's Energy and Environmental Branch prepared an Environmental Assessment described in the June 10, 1980, decision instituting the investigation in this proceeding. It was determined in the Assessment that the environmental and energy impacts of the proposed abandonment would not be significant. The Assessment recognized, however, that the right-of-way would be suitable for alternative public use, assuming abandonment were authorized, if KCPSFO has saleable title to the property comprising the right-of-way. No comments to the Assessment have been received.

This proceeding presents the usual situation in which abandonment of a segment of rail line is sought by a noncarrier shipper, and the abandonment proposal is opposed by the rail carrier. 49 U.S.C. 10903 (formerly sec-

tion 1(18) of the Interstate Commerce Act) provides in part that a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission may abandon any part of its railroad lines, only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment. In *Texas v. E.T.R.R.*, 258 U.S. 204, the Supreme Court held that "Session 1 (18-20) of the Act is expressly restricted to carriers engaged in transporting persons or property in interstate or foreign commerce." Following that line of reasoning any application for abandonment under section 1(18) (now 49 U.S.C. 10903) filed by a non-carrier, such as the applicant in the instant proceeding, would have to be summarily dismissed for lack of jurisdiction. However, in subsequent decisions the Supreme Court has held that persons other than a carrier who have a proper interest in the subject matter may file applications for abandonment under section 1(18) (now 49 U.S.C. 10903). See *Thompson v. Texas-Mexican R. Co.*, 328 U.S. 123 (1946) and *Atchison, T.&S.F. Ry. Co. v. Railroad Commission*, 283 U.S. 380 (1931). Thus it would appear that we must accept applications for abandonment filed by non-carriers.

The language of 49 U.S.C. 10903 does not authorize this Commission to order any carrier to abandon any part of its line of railroad. On the contrary, our authority thereunder is permissive only. It must also be remembered that for abandonment to occur there must be an intent to abandon coupled with some act. Therefore, in order to invoke 49 U.S.C. 10903 and obtain a certificate of abandonment, the application must show that the carrier intends to abandon the line of railroad for which the certificate of abandonment is sought. Where the carrier itself files

the application there is no question as to its intent to abandon. However, when the application is filed by a party other than the carrier, such applicant has the burden of establishing the intent of the railroad to abandon the line in question.

In the instant proceeding the railroad, intervening as a protestant, contends that it is an active railroad and has at no time indicated an intention to abandon that part of the line of railroad for which the certificate of abandonment is sought. On the other hand, the applicant, Modern Handcraft, Inc., contends that service over the line in question has been enbargoed since 1968; that the tracks and right-of-way have been paved over; that the premises is leased for non-railroad purposes as a parking lot; and that it can be inferred from such acts that the railroad intends to abandon that portion of its line of railroad. Admittedly the intent to abandon can be shown from past acts of the railroad. See *Denver & R.Co. v. Mills*, 222 F. 481 (1913). However, it is well established that this Commission has no jurisdiction to make such a finding under 49 U.S.C. 10903. See *Powell v. United States*, 300 U.S. 276 (1937), as well as entire Commission decisions in 335 I.C.C. 415, and 317 I.C.C. 253 (1962), affirmed 217 Fed. Supp. 252. Therefore, since applicant has not presented any evidence of the railroads intent to abandon the considered portion of its line which we may properly consider, we must dismiss the application.

It is ordered:

The application of Modern Handcraft, Inc., for abandonment of 422.08 feet of a line of railroad owned by Kansas City Public Freight Operation located in Kansas City, MO, is dismissed.

By the Commission, Review Board Number 5, Members Krock, Taylor, and Williams. (Board Member Krock dissenting).

/s/ Agatha L. Mergenovich
Agatha L. Mergenovich
Secretary

(SEAL)

Board Member Krock dissents: The line was embargoed in September 1968. Five years later, in December 1973, the line was removed from the railroad's control by local court order, and it was not returned to railroad control for four years. The involved portion of line is paved over and used as a parking lot.

The record contains no evidence that the railroad has sought to remedy the latter fact. Nor does it show that the railroad has done anything to indicate that it intends to utilize the line for rail service. Further, the railroad has attempted to sell the line.

In my opinion, there is sufficient evidence to warrant a conclusion that the railroad has the requisite intent to abandon the line.

I realize that an approval of the application is permissive and that the railroad cannot be required by our decision to actually abandon the line; however, in view of the absence of traffic to warrant continuance of the line, I vote to grant the application.

Late Release
Service Date
April 3, 1981

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 29330

MODERN HANDCRAFT, INC. - ABANDONMENT
IN JACKSON COUNTY, MO

Finance Docket No. 29485F

KANSAS CITY PUBLIC SERVICE FREIGHT
OPERATION - ABANDONMENT IN
JACKSON COUNTY, MO

Decided: April 3, 1981

By decision entered January 19, 1981 and served February 4, 1981, in Finance Docket No. 29330, Review Board Number 5 dismissed the application of Modern Handcraft, Inc. for abandonment of 422.08 feet of a line of railroad owned by Kansas City Public Service Freight Operation (KCPSFO) in Kansas City, MO. The dismissal was based on the failure of applicant to present evidence of the railroad's intent to abandon the involved portion of track. Review Board Number 5 also denied a motion to consolidate the proceeding in Finance Docket No. 29330 with the proceeding in Finance Docket No. 29485. In the latter proceeding, Kansas City Area Transportation Authority (KCATA) filed an application to abandon 8 miles of main line trackage owned by KCPSFO in Kansas City, MO. The 422 foot segment that is the subject of the Modern Handcraft application is included in the 8-mile line KCATA seeks to have abandoned.

At the time Review Board Number 5 reached its decision in Finance Docket No. 29330, the time for filing verified statements under the modified procedure instituted in Finance Docket No. 29485 had not been concluded. In denying the motion to consolidate, Review Board Number 5 could find insufficient justification for delaying disposition of the proceeding in Finance Docket No. 29330.

Applicant has filed an appeal from the Review Board Number 5 decision. The time for filing verified statements in Finance Docket No. 29485 has concluded. At this time, good cause appears for consolidating the two proceedings. The matter of the railroad's intent to abandon the line is a crucial issue in both proceedings. Moreover, since the two proceedings involve a partial overlap of trackage sought to be abandoned, and to avoid contradictory results, the intent issue in each proceeding should be decided concurrently by the same decisional body.

It is recognized that the two proceedings have different statutory time frames for reaching a decision. However, upon the consolidation of the two proceedings, I conclude that the later timeframe covering a decision on the appeal in Finance Docket No. 29330 will control both proceedings. The application in Finance Docket No. 29330 was filed April 17, 1980, and accordingly, the applicable statutory timeframe for reaching a decision on the appeal would be governed by 49 U.S.C. 10327, rather than by 49 U.S.C. 10904, as amended by the Staggers Rail Act of 1980. The appeal was filed on February 24, 1981. If the statutory timeframe for reaching an initial decision in Finance Docket No. 29485 were also applied to the appeal in Finance Docket No. 29330, the usual 180-day period for deciding appeals would be sub-

stantially reduced to a 35-day period. The longer 180 day timeframe is necessary to enable a complete consideration of the arguments raised in the appeal (and in the later - filed replies to the appeal).

It is ordered:

1. The proceeding in Finance Docket No. 29330 and Finance Docket No. 29485 are consolidated.

2. This decision shall be effective on the date it is served.

By the Commission, Gary L. Edles, Director, Office of Proceedings.

/s/ Agatha L. Mergenovich
Agatha L. Mergenovich
Secretary

(SEAL)

(Service Date August 21, 1981)

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 29330[1]

MODERN HANDCRAFT, INC. - ABANDONMENT
IN JACKSON COUNTY, MO

Decided: August 19, 1981

Acting on overlapping applications for abandonment filed by noncarriers and objected to by the carrier involved, the Commission found that the public convenience and necessity permit abandonment.

Philip M. Agee and *Phillip S. Brown* for Modern Handcraft, Inc.

James G. Lindquist and *Norman O. Sanders* for Kansas City Area Transportation Authority.

L. R. Magee for Kansas City Public Service Freight Operation.

Walter J. O'Toole, Jr., for City of Kansas City.

INTRODUCTION

This decision deals with two related applications filed by noncarriers seeking a Commission determination that the public convenience and necessity permits or requires abandonment of a rail line despite the opposition of the rail carrier owning the line. Because the issues are related and the track overlaps, we have consolidated the

1. This decision also embraces Finance Docket No. 29485, *Kansas City Public Service Freight Operation-Abandonment in Jackson County, MO.*

two applications for disposition in this decision. For the reasons discussed below, the abandonment applications will be granted.

BACKGROUND

In September of 1968, Kansas City Public Service Freight Operation (Freight Operation) embargoed all rail freight movements over its approximately 8-mile rail line located in Kansas City, MO. Since that time no rail operations have been conducted on this line. The only revenues generated by this line are produced by billboard rentals and parking lot licenses.

On April 17, 1980, Modern Handcraft, Inc. (Handcraft) filed an application, in Finance Docket No. 29330, for a certificate of public convenience and necessity permitting abandonment of 422.08 feet of Freight Operation's track which is adjacent to its property. Review Board Number 5 held that although noncarriers could file abandonment applications, they had to prove that the owning carrier had the intent to abandon the line. Because Handcraft did not meet this burden, its application was dismissed. Handcraft has appealed that decision and Freight Operation has replied.[2]

Approximately 6 months after Handcraft filed its abandonment application, Kansas City Area Transportation Authority (Authority) filed an application, in Finance Docket No. 29485, for a certificate permitting abandonment of Freight Operation's entire line. Authority is a bi-state agency responsible for the development and operation of a mass transit system in the Kansas City Metropolitan area.

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2. Freight Operation's motion for leave to file its reply out of time is granted.

PROCEDURAL MATTERS

Certain procedural matters have been raised by Freight Operation. First, it moves to strike the verified statements and argument of Authority for failure to conform with the requirements of 49 CFR 1100.13 limiting the size of the pleadings to 8 1/2 by 11 inch submissions. Authority's pleading included certain 8 1/2 by 14 inch exhibits. These exhibits are in conformity with the size limitations specified in 49 CFR 1100.82, an exception to the specifications of 49 CFR 1100.13 clearly identified in that rule. The motion to strike is denied.

Second, Freight Operation moves to strike the argument in support of Authority's application submitted by the City of Kansas City (the City) as not timely filed. The City notes that it could not comment on Authority's application until it was filed. If in fact it acted in error, the City moves that the time for filing its pleading be extended and that additional time for response to the pleading be authorized to Freight Operation.

In reply Freight Operation refers to 49 CFR 1100.46 which calls for the joint preparation of pleadings filed under modified procedure by parties having common interests. It notes that the tone of the City's argument and the points raised in its pleading are common to those presented by Authority, and urges that the City's pleading be rejected.

A review of the Commission decisions setting Finance Docket No. 29485 for modified procedure indicates that little guidance was provided to third parties. Under these circumstances and mindful of our grant of Freight Operation's request to file late a reply to the Handcraft appeal in Finance Docket No. 29330, we will accept the City's pleading as a petition to intervene.

DISCUSSION AND CONCLUSIONS

The situation presented here—where a rail line abandonment is sought by noncarrier applicants and opposed by the rail carrier—while uncommon, is not unique. See *Baltimore and Annapolis R. Co. Abandonment*, 348 I.C.C. 678, 704 (1976). Subject to establishing a proper interest in an abandonment proposal, any person may institute a proceeding for the issuance of a certificate of public convenience and necessity authorizing abandonment of a rail line. *Thompson v. Texas-Mexican R. Co.*, 328 U.S. 123 (1946). Handcraft, as an adjacent landowner with a legitimate claim under Missouri law to a reversionary interest in abandoned rail property, and Authority as a bi-state transportation authority with firm development plans for mass transit use of the right-of-way, have established a proper interest in securing abandonment authorization for the Freight Operation line.

The Board erred in dismissing Handcraft's application. It relied on several cases[3] involving applications which were not filed under the abandonment provisions of the Interstate Commerce Act (now 49 U.S.C. 10903, formerly section 1(18)). Indeed, in one case, the Commission's jurisdiction was brought into question because there was no abandonment application. See *McGrody* at 254. Here, both ap-

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3. *Powell v. United States*, 300 U.S. 276 (1937) (Complaint by carrier to invalidate tariff filed by another carrier); *Adequacies-Passenger Service-Southern Pac. Co.*, 335 I.C.C. 415 (1969) (Investigation to determine extent of the Commission's jurisdiction over the quality of intercity rail passenger service); and *McGrody v. Baltimore & O. R. Co.*, 317 I.C.C. 253 (1962) (*McGrody*), aff'd 217 Fed. Supp. 252 (1963) (Complaint proceeding instituted before the Commission alleging an illegal abandonment). These cases merely recognize that the Commission has no jurisdiction to enforce or determine violations of section 1(18), matters which fall within the exclusive province of the Federal Courts.

plications are properly filed and seek authority in matters over which the Commission's jurisdiction is clearly established and exclusive. Thus, the merits of these applications will be considered.

The record leaves no doubt that a *de facto* abandonment of the Freight Operation line has taken place. No rail service or recognizable rail track maintenance has taken place since September of 1968. Nor has there been any serious effort on the part of Freight Operation to solicit traffic or reinstitute rail service. Indeed, the current use of the rail line for parking lot and billboard purposes is totally unrelated to the carrier's obligation to perform rail service. The only objection to abandonment comes from the carrier itself, whose principal interest appears to be the price and terms for the sale of the right-of-way.

It is apparent that the existence of our jurisdiction has enabled Freight Operation to maintain control over the property despite repeated attempts by State agencies to have the property condemned. Authority has been trying for years to acquire the line because the line is suitable for an urban transit system. However, its negotiations with Freight Operation to acquire the line have been unsuccessful. As a result, Authority sought court relief.

In *Kansas City Area Transp., etc. v. Ashley,* 555 S.W. 2d. 9 (1977), the Missouri Supreme Court rejected an attempt to have the right-of-way and operating equipment condemned holding that the railroad was a common carrier and, therefore, under our jurisdiction. The court noted that the evidence "strongly indicates" that there had been a *de facto* abandonment of rail service by the railroad (555 S.W. 2d at 10). Nevertheless, the court concluded, the

legal abandonment of the line can only be accomplished by a Commission order (*id.*). The court went on to state (*id.* at 11):

> We do not believe the ICC will allow this appellant-railroad to persist in a nonservice (embargoed) status and continue to exist under the facade of an operating railroad merely to keep a right-of-way easement in the metropolitan area out of public use in the face of the congressional intent evidenced by 49 U.S.C. sec. 1a(10), which clearly demonstrates a national policy that unused railroad right-of-ways be utilized where feasible for other public purposes.

We agree with the court that this unused right-of-way is suitable for other public purposes and should be so used.

The function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding federal interest in Interstate Commerce. Where as here there have been no rail operations for over 12 years and no attempt to provide rail service, we can find no public benefit in preventing a State condemnation proceeding.

We find that the rail service which Freight Operation is authorized to perform is not required and that elimination of this line will not burden interstate commerce and will benefit the public. Although it is true that the grant of an abandonment application is permissive and the railroad can choose not to surrender its common

carrier status and obligations, a certificate of abandonment is evidence in any court proceeding that the line is not required by the public for rail operations. AB-71 (Sub-No. 1), *Anne Arundel County and The City of Annapolis - Abandonment over the Baltimore and Annapolis Railroad Company from Glen Burnie to The City of Annapolis* (not printed), decided February 27, 1980. Should an issue involving this property arise before any Missouri Court, our jurisdiction should not be seen as an impediment to the disposition of the property.

The environmental and energy impacts of the abandonment proposals have been examined and found not to be significant. The Environmental Assessments did recommend the imposition of an alternative public use condition pursuant to 49 U.S.C. 10906, limiting the ability of Freight Operation to transfer the right-of-way for other than a public use purpose for a period of 120 days following the effective date of this decision.

Authority, fearing the effect that abandonment of the rail line will have upon Freight Operation's title to the right-of-way, requests that the public use condition be imposed for 180 days. It believes that under section 10906, Freight Operation would be required to offer the property for sale for public purposes during those 180 days. While Authority is correct that the time period for a public use condition imposed under section 10906 is a maximum of 180 days, it misunderstands the effect of this statutory provision. A public use condition imposed pursuant to section 10906 merely prevents a carrier from disposing of the property for a non-public purpose during the length of the conditioned period. Imposition of this condition will not force Freight Operation to sell the right-of-way to Authority or any other party. However, in

light of Authority's request and our own determination that the land is suitable for public use, we will impose the public use condition for the maximum 180 days.

Authority also made two other requests. First, it suggests that we grant it a certificate of public convenience and necessity to operate exclusively or in conjunction with Freight Operation along the Right-of-Way. Without any supporting application or evidence, we must deny this request. Moreover, we note that we have no jurisdiction over the mass transit operation that Authority seemingly wants to begin. See 49 U.S.C. 10504(b).

Second, Authority requests that we postpone the effective date of our decision for the 180-day period during which the public use condition is in effect. This too we are unable to do. Under the statute the issuance or effectiveness of an abandonment certificate may only be delayed if there is an offer under the financial assistance procedures set forth at 49 U.S.C. 10905. Thus, this decision will be effective 30 days after service and the certificates shall be issued on that date unless the financial assistance offer procedures are triggered.

We find that the present and future public convenience and necessity permits abandonment by Freight Operation of its entire line of railroad in Kansas City, MO. Employee protective conditions are not imposed in cases involving complete abandonment of operations. See *Northampton and Bath R. Co. - Abandonment,* 354 I.C.C. 784, 785-787 (1978); *Wellsville, Addison & Galeton R. Corp. - Abandonment,* 354 I.C.C. 744, 745-746 (1978); *Tennessee Central Ry. Co. Abandonment,* 333 I.C.C. 433, 454 (1968); and *Okmulgee Northern Ry. Co. Abandonment,* 320 I.C.C. 637 (1964). Freight Operation shall keep

intact all of the right-of-way underlying the track, and all bridges and culverts on the line for a period of 180 days from the effective date of this decision to permit any State or local government agency or other interested party to negotiate the acquisition for public use of all or any portion of this line.

We further find that abandonment of this line will not have a serious, adverse impact upon rural and community development in Jackson County. MO. This action will not significantly affect the quality of the human environment or conservation of energy resources.

It is ordered:

1. In Finance Docket No. 29330, the appeal of Modern Handcraft, Inc. is granted, and the decision of Review Board Number 5, served February 4, 1981, as reversed.

2. The findings made here are being published in the *Federal Register* concurrently with service of this decision. In the event any person or governmental entity is considering an offer of financial assisstance or an offer to purchase the line, to enable rail service to be continued, it must tender such offer to the carrier within 10 days following publication. The offer must also be filed concurrently with the Commission and the offeror must also comply with the requirements of 49 CFR 1121.38(c) and 49 U.S.C. 10905, as amended by section 402(c) of the Staggers Rail Act of 1980. Within 10 days after receiving appropriate notification that an offer of financial assistance is being considered, the railroad shall comply with the informational requirements of 49 CFR 1121.38(e), and 49 U.S.C. 10905(c), amended by section 402(c) of the Staggers Rail Act of 1980.

3. All correspondence to the Commission with respect to offers of financial assistance for the continued operation or acquisition of the line shall contain an appropriate reference to these proceedings, and the following notations shall be typed in boldface on the lower left corner of envelopes containing such correspondence: "Section of Finance, AB-RSCP."

4. Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued. The railroad shall not effect abandonment prior to the effective date of the certificate of abandonment.

5. This decision shall be effective 30 days from the date it is served.

By the Commission, Chairman Taylor, Commissioners Gresham, Clapp, and Gilliam.

/s/ Agatha L. Mergenovich
Agatha L. Mergenovich
Secretary

(SEAL)

(Service Date September 16, 1981)

INTERSTATE COMMERCE COMMISSION
CERTIFICATE AND DECISION

Finance Docket No. 29330[1]

MODERN HANDCRAFT, INC.—ABANDONMENT—
IN JACKSON COUNTY, MO

Decided: September 11, 1981

I have considered the record in this proceeding, including the administratively final decision served August 21, 1981, in which the Commission authorized the abandonment by Kansas City Public Service Freight Operation (Freight Operation) of its entire line of railroad in Kansas City, MO, a distance of approximately 8 miles. That decision also provided that any person, including a government entity would be given the opportunity to make an offer of financial assistance to the carrier applicant, within 10 days of the date of publication of the Commission's findings in the Federal Register, by filing with the Commission an offer containing the evidence specified in 49 U.S.C. 10905, as amended by Section 402(c) of the Staggers Rail Act of 1980 and 49 C.F.R. 1121.38(b), as amended by the Commission interim abandonment rules served November 25, 1980, 45 *Fed. Reg.* 78144.

The notice of findings was published in the Federal Register on August 21 1981. The time for the filing of offers of financial assistance has expired without a bona fide offer. In the absence of such an offer, an appropriate certificate and decision should be entered.

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1. This decision also embraces Finance Docket No. 29485, *Kansas City Public Service Freight Operation—Abandonment—in Jackson County, MO.*

It is certified that the present and future public convenience and necessity permit the abandonment of the above-described line, subject to the provision that Freight Operation shall keep intact all of the right-of-way underlying the track, and all bridges and culverts on the line for a period of 180 days from September 20, 1981, to permit any State or local government agency or other interested party to negotiate the acquisition for public use of all or any portion of this line.

It is ordered:

1. This certificate and decision shall be effective 30 days from the date of service. Tariffs applicable to the line permitted to be abandoned may be canceled upon not less than 10 days' notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission. When filing schedules cancelling tariffs applicable to said line, Freight Operation shall, in such schedules, refer to this certificate and decision by date and docket number.

2. If the authority granted by this certificate and decision is exercised, Freight Operation shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

3. If the authority granted in this certificate and decision is not exercised within one year from its effective date, it shall be of no further force and effect.

By the Commission, Gary J. Edles, Director, Office of Proceedings.

/s/ Agatha L. Mergenovich
Agatha L. Mergenovich,
Secretary

(SEAL)

(Service Date September 28, 1981)

INTERSTATE COMMERCE COMMISSION
*CORRECTED CERTIFICATE AND DECISION

Finance Docket No. 29330[1]

MODERN HANDCRAFT, INC.—ABANDONMENT—
IN JACKSON COUNTY, MO

Decided: September 11, 1981

I have considered the record in this proceeding, including the administratively final decision served August 21, 1981, in which the Commission authorized the abandonment by Kansas City Public Service Freight Operation (Freight Operation) of its entire line of railroad in Kansas City, MO, a distance of approximately 8 miles. That decision also provided that any person, including a government entity would be given the opportunity to make an offer of financial assistance to the carrier applicant, within 10 days of the date of publication of the Commission's findings in the Federal Register, by filing with the Commission an offer containing the evidence specified in 49 U.S.C. 10905, as amended by Section 402(c) of the Staggers Rail Act of 1980 and 49 C.F.R. 1121.38(b), as amended by the Commission interim abandonment rules served November 25, 1980, 45 *Fed. Reg.* 78144.

The notice of findings was published in the Federal Register on August 21, 1981. The time for the filing of offers of financial assistance has expired without a bona fide offer. In the absence of such an offer, an appropriate certificate and decision should be entered.

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1. This decision also embraces Finance Docket No. 29485, *Kansas City Public Service Freight Operation—Abandonment—in Jackson County, MO.*

It is certified that the present and future public convenience and necessity permit the abandonment of the above-described line, subject to the provision that Freight Operation shall keep intact all of the right-of-way underlying the track, and all bridges and culverts on the line for a period of 180 days from September 20, 1981, to permit any State or local government agency or other interested party to negotiate the acquisition for public use of all or any portion of this line.

It is ordered:

1. This certificate and decision shall be effective 30 days from the date of service. Tariffs applicable to the line permitted to be abandoned may be canceled upon not less than 10 days' notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission. When filing schedules cancelling tariffs applicable to said line, Freight Operation shall, in such schedules, refer to this certificate and decision by date and docket number.

2. If the authority granted by this certificate and decision is exercised, Freight Operation shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

By the Commission, Gary J. Edles, Director, Office of Proceedings.

/s/ James H. Bayne
James H. Bayne
Acting Secretary

(SEAL)

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*Corrected to delete the 3rd ordering paragraph.

(Service Date October 2, 1981)

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 29330[1]

MODERN HANDCRAFT, INC. - ABANDONMENT
IN JACKSON COUNTY, MO

Decided: September 30, 1981

On September 9, 1981 protestant Kansas City Public Service Freight Operation (Freight Operation) filed a petition for administrative review of our August 19, 1981, decision in this proceeding which determined that the public convenience and necessity permitted the abandonment of protestant's 8-mile rail line in Kansas City, MO. A corresponding petition to stay the October 16, 1981, effective date of the abandonment certificate was also filed by protestant.

In the petition for administrative review protestant points out that a portion of this line (4,098 feet) is the subject of an existing trackage rights agreement with the Missouri Pacific Railroad Company (MoPac). See Finance Docket No. 25922, *Missouri Pacific Railroad Company Co. - Lease and Operate Certain Trackage - Kansas City Public Service Freight Operation at Dodson, MO.* (not printed), decided February 27, 1970. Notwithstanding the fact that in decisions served June 10, 1980, and December 4, 1980, in the respective proceedings consolidated here, protestant was instructed to provide information concerning other railroads in the area directly affected

1. Embraces Finance Docket No. 29485, *Kansas City Public Service Freight Operation - Abandonment in Jackson County, MO.*

by abandonment of this line, the petition here marks the first disclosure concerning this trackage rights agreement. Although proper notice of these applications was afforded the public, MoPac has failed to assert any interest it might have.

We believe that it is important to develop this issue further, since trackage rights operations may not properly be discontinued without a certificate from the Commission. *Louisville & N. R. Co. - Trackage Rights,* 334 I.C.C. 412, 416 (1969).

Therefore, we will reopen this proceeding for the limited purpose of examining the trackage rights agreement and its effect on this abandonment proceeding.

Under 49 U.S.C. 10904(c)(3), the abandonment certificate issued in this consolidated proceeding must be effective by November 2, 1981 (75 days after the August 19, 1981 final decision). Consequently, effectiveness will be stayed until that date.

Applicant, protestant Freight Operation and MoPac (who will be served with a copy of this decision) are directed to file upon the Commission and other parties of record, within 10 days from the service date of this decision, information regarding this trackage rights agreement and the effect abandonment of the remainder of the line might have upon any operations under the trackage rights. This information should include a copy of the trackage rights agreement, detailed information about the operations performed pursuant to the agreement, the current status of the agreement, and any other relevant information. Interested parties will be given 10 additional days to respond. Information filed during this 20-day period must be restricted exclusively to the trackage rights agreement.

It is ordered:

(1) These proceedings are reopened for the limited purpose of receiving information concerning the trackage rights agreement in Finance Docket No. 25922, *Missouri Pacific Railroad Co. - Lease and Operate Certain Trackage - Kansas City Public Service Freight Operation at Dodson, Mo.*

(2) Protestant Kansas City Public Service Freight Operation and the Missouri Pacific Railroad Company are directed to file with this Commission, and upon all parties of record, information regarding the trackage rights agreement and the effect abandonment of the remainder of the line might have upon any operations under the trackage rights. This should include the information specified in the text of this decision.

(3) Replies to the additional information submitted by protestant and MoPac must be filed within 20 days of the service of this decision.

(4) The effectiveness of the abandonment certificate previously issued in this consolidated proceeding is stayed until November 2, 1981.

(5) This decision shall be effective on the date served.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

/s/ James H. Bayne
James H. Bayne
Acting Secretary

(SEAL)

(Service Date November 2, 1981)

INTERSTATE COMMERCE COMMISSION
CORRECTED CERTIFICATE AND DECISION

Finance Docket No. 29330[1]

MODERN HANDCRAFT, INC. - ABANDONMENT IN JACKSON COUNTY, MO

Decided: October 30, 1981

On September 9, 1981, protestant Kansas City Public Service Freight Operation (Freight Operation) filed a petition for administrative review of our August 19, 1981, decision permitting abandonment. Applicants Modern Handcraft, Inc. (Handcraft) and Kansas City Area Transportation Authority (Authority) filed replies.

In its petition Freight Operation noted that a portion of this line (4,098 feet) is the subject of an existing trackage rights agreement with the Missouri Pacific Railroad Company (MoPac). See Finance Docket No. 25922, *Missouri Pacific Railroad Co. - Lease and Operate Certain Trackage - Kansas City Public Service Freight Operation at Dodson, MO* (not printed), decided February 27, 1970. The existence of this trackage rights agreement was not disclosed earlier.[2] Since trackage rights operations may

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1. Embraces Finance Docket No. 29485, *Kansas City Public Service Freight Operation - Abandonment in Jackson County, MO.*

2. Freight Operation is admonished for causing unnecessary delay in the prosecution of these applications. Notwithstanding the fact that in decisions served June 10, 1980, and December 4, 1980, it was instructed to provide information concerning other railroads in the area directly affected by abandonment of this line, its petition for administrative review marked the first disclosure of the existing trackage rights agreement with MoPac.

not properly be discontinued without a certificate from the Commission,[3] we stayed the effectiveness of the abandonment certificate previously issued in this proceeding until November 2, 1981 (the date upon which effectiveness is mandated by statute[4]) and reopened the proceeding to receive further evidence and argument on this matter.

The track which is the subject of this agreement lies generally between the middle of Prospect Avenue and a point just beyond Indiana Avenue (near MoPac milepost 289.42). MoPac uses this trackage for switching and the provision of team track service. On the basis of the trackage rights agreement, which runs until October 1984, Mo Pac asserts a continuing interest in this track, none of which was included in applicants' original proposal.

The existence of MoPac's trackage rights interest does not affect our prior determination. That agreement involves a small portion of protestant's line which is outside the scope of this proceeding, and, therefore, will not be directly affected by our findings. In our earlier decision granting these applications, as well as in the certificate previously issued, we mistakenly indicated that protestant's entire line of railroad in Kansas City, MO was affected. The applications, however, only seek abandonment of that portion of protestant's line which extends between 40th and Mill Street and 85th and Prospect Street in Kansas City. The Federal Register notice of our findings in this proceeding correctly described the exact scope of our determination. MoPac states that abandonment of the portions not used by it would have no effect on

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3. Louisville & N. R. Co. - Trackage Rights, 334 I.C.C. 412, 416 (1969).

4. 49 U.S.C. §10904(c)(3).

its operations. However, Freight Operation contends that abandonment of the remaining portion of its line would adversely affect MoPac since it would deny that carrier access to traffic generated on the line in the future.

Freight Operation also argues that our prior decision in this proceeding erroneously concluded that there has been a *de facto* abandonment of its line, because it has no intention to cease serving as a railroad. It contends that the embargo of the line, necessitated by factors beyond its control, does not constitute an abandonment. Freight Operation states that it would resume operations if there were traffic available to be transported at feasible rates. It states that the line has been maintained to permit resumption of service. Finally, it argues that we erred in using the procedures of 49 U.S.C. §10905 to make the right-of-way available for urban mass transit purposes.[5]

In addition, Freight Operation has filed a letter supporting Authority's October 27, 1981, request that its application and that of Handcraft be dismissed at this time.[6] Authority argues that abandonment must not be granted because if it is, the land may revert to adjoining landowners thus thwarting its desire to use the right-of-way for a mass transit system. It says that it has now reached an agreement for the purchase of the line which calls for Freight Operation to receive back trackage rights over the line.

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5. Petitioner correctly pointed out that where a person or governmental entity is considering the acquisition of abandoned rail property for urban mass transit purposes, the financial assistance procedures of 49 U.S.C. §10905 are inapplicable. In fact, this point was explained in a September 3, 1981, decision in this proceeding, which refused to consider Authority's "offer".

6. Because of the late filing date of Authority's pleading, the other applicant in this consolidated proceeding, Handcraft, has not had an opportunity to respond.

The request for dismissal of both applications must be denied on its merits. This is an unusual proceeding because the moving parties are noncarriers and the carrier, which has not operated in over a dozen years, opposes abandonment. In our earlier decision we found that a *de facto* abandonment had in fact occurred and that we could not countenance Freight Operation's attempts to use our jurisdiction as a shield against State law where there is no overriding Federal interest in interstate commerce.

Nothing introduced or argued by Freight Operation or Authority changes our conclusions. We remain convinced that the public convenience and necessity permit this abandonment and that there is no need for our continuing jurisdiction over the line.

Because this proceeding does not involve an entire line abandonment appropriate protective conditions must be imposed. 49 U.S.C. §10903(b)(2). Our previously issued certificate in this proceeding, which is effective on November 2, 1981, will be corrected here to accomplish this.

It is certified:

The present and future public convenience and necessity permits the abandonment by Kansas City Public Service Freight Operation of a portion of its line of railroad in Kansas City, Jackson County, MO, between 40th and Mill Streets and 85th and Prospect Streets, a total distance of approximately 8 miles, subject to the conditions for the protection of railroad employees set forth in *Oregon Short Line R. Co. - Abandonment, Goshen*, 360 I.C.C. 91 (1979).

It is ordered:

1. The petition for administrative review is denied.

2. The request of the Kansas City Area Transit Authority to withdraw its abandonment application and the corresponding motion to strike the prior decision in this proceeding permitting abandonment are denied.

3. This decision is effective on the date of service, and the corrected certificate is effective November 2, 1981.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

/s/ Agatha L. Mergenovich
Agatha L. Mergenovich
Secretary

(SEAL)

(Service Date March 24, 1982)

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 29330[1]

MODERN HANDCRAFT, INC. - ABANDONMENT IN JACKSON COUNTY, MO

Decided: March 18, 1982

In a joint petition filed December 22, 1981, applicant Kansas City Area Transportation Authority (Authority) and protestant Kansas City Public Service Freight Operation (Freight Operation) request the Commission to reopen this proceeding for the limited purpose of imposing a 90 day expiration date upon the certificate of abandonment issued November 2, 1981. Applicant Modern Handcraft, Inc. (Handcraft) filed a reply and separate letter in opposition to the joint petition.

On January 26, 1982, Authority and Freight Operation submitted a joint motion to strike portions of the Handcraft reply and letter to which Handcraft replied. Handcraft as an applicant in Finance Docket No. 29330 and a participant in Finance Docket No. 29485 is a proper party to this proceeding. Its reply and letter were responsive to the issues raised in the joint petition. The joint motion to strike is denied.

In requesting the Commission to impose a time limitation upon the abandonment certificate, petitioners point out that the certificate itself is permissive and that Freight

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1. Embraces Finance Docket No. 29485, *Kansas City Public Service Freight Operation - Abandonment in Jackson County, MO.*

Operation has no intention of exercising this permissive authority. Further, they assert that the possibility of a contested condemnation suit between Authority and Freight Operation no longer exists as the parties have amicably resolved their differences and Authority has acquired Freight Operation's interest in the subject right-of-way. Petitioners, however, consider the mere existence of an abandonment certificate as a potential source of controversy over title to the right-of-way which could precipitate unmeritorious title claims that otherwise would not be brought. To avoid the possibility of such controversies, petitioners urge the Commission to follow its usual practice of limiting the life of an abandonment certificate by here imposing a 90 day expiration date.

The authorization of abandonment in this proceeding emphasized that we would not allow our jurisdiction to be used as a shield against the legitimate processes of State law where there existed no overriding Federal interest in interstate commerce. In the face of no rail operations over the subject line in the past twelve years nor any reasonable attempt to provide rail service, it was apparent that a continuation of our jurisdiction over the line was neither necessary nor desirable. For this reason, the abandonment authorization issued in our decision served August 21, 1981, imposed no time limitation upon the authority granted. The intent of the August 21, 1981, decision to impose no time limitation upon the abandonment authorization was properly reflected in the certificate of abandonment issued November 2, 1981.

Petitioners' concern over the potential for litigation arising out of conflicting claims to the subject right-of-way are directed at issues relating to real property rights. Such matters are not properly within the purview of this

Commission but fall within the exclusive jurisdiction of the State in which the property is located. The clear intent of our decision in this proceeding was to prevent reliance upon our jurisdiction effectively to impede the appropriate application of Missouri law.

The petition to reopen will be denied.

It is ordered:

1. The petition to reopen is denied.

2. This decision shall be effective on its date of service.

By the Commission, Chairman Taylor, Vice-Chairman Gilliam, Commissioners Gresham, Clapp, and Sterrett.

/s/ Agatha L. Mergenovich
Agatha L. Mergenovich
Secretary

(SEAL)

APPENDIX B

28 U.S.C. § 1257

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(As amended July 29, 1970, Pub.L. 91-358, Title I, § 172 (a)(1), 84 Stat. 590.)

APPENDIX C

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

KCATA	)	
PLAINTIFF	)	
vs.	)	NO. CV83-14703
4550 MAIN ASSOCIATES, et al	)	
DEFENDANT	)	

DOCKET 'P'

[X] CIRCUIT JUDGE CASE

☐ ASSOCIATE CIRCUIT JUDGE CASE

DIVISION 13

ORDER

The defendants have filed an application for continuance basing the application on a motion for summary judgment filed by plaintiff on March 29th. The defendants need not worry about the court ruling adversely to the defendants on plaintiff's motion for summary judgment in the event this case is called for trial the week of April 8th. In the event the case is called for trial the motion for summary judgment will be overruled for the reason that it was not filed timely. The filing of a motion for summary judgment a week or two before a trial date is not a timely filing which allows adverse counsel to adequately respond. Therefore, the defendants need not concern themselves with the motion for summary judgment in the event the case is called for trial.

The application for continuance is OVERRULED.

The plaintiff's application for continuance filed April 3, 1985 is OVERRULED.

/s/ (Illegible)
Judge

APRIL 4, 1985

Copies mailed APRIL 4, 1985 to:

JAMES G. LINDQUIST
W. STEPHEN NIXON

/s/ (Illegible)
Division Clerk

APPENDIX D

Jury Instruction Conference

* * *

[706] MR. LINDQUIST: Can we take up one short matter? Excuse my tardiness on it. I want to tender an instruction, handwritten, having to do with what we contend is the only way that a jury could find an abandonment in this case, and that is that the Ashleys exercised a permit to abandon—that the Ashleys exercised the certificate permitting the abandonment that was issued by the Interstate Commerce Commission, and in fact, the instruction that I submit to the Court for its consideration is that "Your verdict must be for plaintiff if you believe the Ashleys did not exercise the certificate permitting abandonment issued by the ICC." Since we believe ICC law is controlling, that is the only factual issue which we believe the jury would ever have to decide on the issue of abandonment.

THE COURT: You object?

MR. NIXON: And I object.

[707] THE COURT: And that's marked A and the objection sustained.

MR. LINDQUIST: I need to mark that as submitted by plaintiff.

THE COURT: I'm going to let you redo it, do it in typing after we're all done.

Do you have any other instructions that you're going to offer, because I have got two sitting here and—if you have other instructions that you want offered, I want you to show them.

MR. LINDQUIST: Yes. I offer as Instruction B an instruction that would set out in a sum certain what defendant's damages were if the verdict were in favor of defendant on the issue of abandonment. I don't have my trial notes in here. The figure that I want to put in here is the four years of lost income from the billboard that was like $50, $250, $300, and whatever, for the fourth year, and I can supply that figure to you now, if you want, or you can let me amend with that figure that is not in dispute in the evidence.

THE COURT: To which you object?

MR. NIXON: I object.

THE COURT: Sustained. That's marked B. What else?

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April 16, 1985

Stephen Nixon, Esq.
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P. O. Box 357
Independence, MO 64051

Re: KCATA v. 4550 Main Associates

Dear Steve:

Enclosed is a copy of the instruction which I submitted and which the Court rejected. Since I only submitted it in a handwritten form, the Court asked me to have it typed up.

Very truly yours,

/s/ Jim
James G. Lindquist
For the Firm

JGL:DC
Enc.

INSTRUCTION NO. .....

Your verdict must be for defendant if you believe:

1. A Certificate of Public Convenience and Necessity permitting the abandonment of the Country Club right-of-way was issued by the Interstate Commerce Commission, and

2. The said Certificate of Public Convenience and Necessity became effective, and

3. All conditions of the said Certificate of Public Convenience and Necessity had been met or had expired, and

4. Thereafter, the Country Club right-of-way was abandoned.

49 USC 10903, 10905 and 10906

Hayfield Northern Railroad Co., Inc. & Minnesota v. Chicago & Northwestern Transportation Co., 104 S. Ct. 2610 (1984)

Submitted by Plaintiff

APPENDIX E

Trial Transcript

Partial Testimony of Richard F. Davis C.E.O. of KCATA

* * *

[355] Q. Now, were there periods of time when the Kansas City Area Transportation Authority had possession of this right-of-way? A. Yes.

Q. And during the time that you had possession, you didn't run a railroad on it, did you? A. No. Had no intention to.

Q. And isn't it correct to say that you had no intention at that time to operate a railroad at all? A. Our intention has always been to utilize the right-of-way for a light rail system.

Q. Now, as I understand this case, that contention is based upon your belief that in the future, sometime in the future, that might become necessary and feasible, is that correct? [356] A. I believe it will become feasible.

Q. But at the moment, today, it's not, is it? A. Is it feasible in 1985, no, sir.

Q. So you're not talking about a current 1984 (sic) use of this right-of-way for railroad purposes at all, are you? A. That's correct.

* * *

[362] Q. (By Mr. Nixon) Mr. Davis, have you made statements publicly concerning the feasibility of the light

rail system that you anticipate would be used on this property? A. On numerous occasions.

Q. And is it true that you stated that the property—or that use might not be available for 20 years or more? Do you recall making a statement of that? A. Would you restate what I said?

Q. That it might be 20 years or more before such a use would be— A. Before the light rail system is developed?

Q. Yes. A. I'd say that's a reasonable statement. I may have said that.

Q. Do you also recall making the statement that, Who [363] knows when tomorrow is, could be this year or at an indeterminate time in the future, something to that effect? A. I think we have been careful to avoid saying what particular year we expect it to be developed.

* * *

(3)

Supreme Court, U.S.
FILED
JAN 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-954

In the Supreme Court of the United States

OCTOBER TERM, 1987

KANSAS CITY AREA TRANSPORTATION AUTHORITY,

Petitioner,

vs.

4550 MAIN ASSOCIATES, A PARTNERSHIP, FRANK S. JENNINGS

and

FRED E. CULVER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

PETITIONER'S REPLY MEMORANDUM

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In the Supreme Court of the United States

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4550 MAIN ASSOCIATES, A PARTNERSHIP, FRANK S. JENNINGS

and

FRED E. CULVER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

PETITIONER'S REPLY MEMORANDUM

I. The decision of the Missouri Court of Appeals is a final judgment for jurisdictional purposes.

In petitioner's Statement of Jurisdiction petitioner noted that the state court opinion did not dispose of respondents' counterclaim damages for rents and profits. It is not to avoid this insignificant matter that petitioner now seeks relief from the Court. Rather, petitioner needs the immediate review of the Court so that the right-of-way will not be lost to public use.

Under Missouri law, title to the fee underlying a railroad right-of-way is presumed to be in the abutting landowners. Upon abandonment, those abutting landowners own the fee free from the railroad easement. As a result of the opinion of the Missouri Court of Appeals the ownership of the right-of-way is, to say the least, in doubt. Petitioner cannot possibly manage the right-of-way and proceed with the planning and development of a light rail mass transportation system in the face of thousands of claims of abandonment by the abutting property owners. Absent a Writ of Certiorari, it may reasonably be expected that many abutting property owners will decide to use and develop the windfall property accretion decreed by the state court. For practical purposes, the right-of-way will be lost. Under such circumstances, the Court has recognized that pragmatic principles justify a finding of finality. (See cases cited in petitioner's jurisdictional statement.)

II. The federal question was properly presented and preserved for review at each court below.

Respondents' argument that somehow petitioner failed to preserve for review the federal question is without merit. It is clear that petitioner did raise the federal question prior to trial, at trial and then again on appeal. (See Petition, pp. 8-9) In fact, the cardinal point asserted by petitioner in its brief on appeal was that "The verdict and judgment of the Court should be upheld because the evidence demonstrates that, as a matter of law, the Country Club Right-of-Way had not been abandoned." The point made the following argument: 1) the ICC had exclusive jurisdiction over the right-of-way which jurisdiction was exercised by various ICC orders relating to the right-of-way through November 2, 1981; 2) the ICC not only did not authorize an abandonment prior to Novem-

ber 2, 1981, it specifically ordered that no abandonment could occur until that date; 3) before November 2, 1981 petitioner, KCATA, purchased the right-of-way for use in a light rail mass transportation system.

It is inconceivable that respondents now contend that petitioner has waived or failed to preserve the federal question. Nor do the authorities cited by respondents support their contention. In both *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 and *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, the Court held that, without a cross appeal, "an appellee may urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." 300 U.S. at 191; 426 U.S. at 481.

It is obvious that this is precisely what petitioner did in arguing on the state appeal that the judgment should be upheld because the application of federal law required it.

III. The ICC imposed its "public use" condition on its Certificate permitting abandonment so that Freight Operation was required to offer the right-of-way for sale for public purposes before otherwise disposing of it.

Twice in their Brief respondents disingenuously suggest, for the first time, that the ICC did not impose its "public use" condition on its Certificate permitting abandonment. In their Statement of Facts, on page seven, respondents say: "On October 30, 1981 the Interstate Commerce Commission issued its corrected Certificate

of Abandonment and Decision, *deleting its prior finding that the right-of-way was suitable for alternative public uses, and removing the 180 day waiting period as a condition.*" (emphasis added) Then, on page fifteen, respondents say the "Certificate of Abandonment issued by the Interstate Commerce Commission on October 31, 1981, (sic) effective November 2, 1981, does not contain a finding that the right-of-way is suitable for alternative public purposes as required by 49 U.S.C. §10906."

Respondents either know nothing about the ICC or they are deliberately trying to mislead the Court. The public use condition of 49 U.S.C. §10906 prohibits a carrier from disposing of rail property, determined by the ICC to be suitable for use for public purposes, for a period of up to 180 days unless first offered for sale for public purposes (49 U.S.C. §10906 is reprinted in Petitioner's Appendix D, A25). In the ICC decisions dated August 19, 1981 (respondents' Appendix A, A24-25) and September 11, 1981 (respondents' Appendix A, A31), the ICC imposed the public use condition on this right-of-way. In fact, the ICC said, in its August 19, 1981 decision, "We agree with the court [Missouri Supreme Court in *KCATA v. Ashley,* 555 S.W.2d 9 (1977)] that this unused right-of-way is suitable for other public purposes and should be so used."

This condition was not "deleted" or "removed" simply because the ICC did not reiterate it in every decision it rendered. Respondents cite no authority for their theory that the ICC, having found the right-of-way suitable for public purposes, meant to retract its finding and condition implicitly by failing to recite them over and over in its orders.

IV. The state court cannot avoid the pre-emption doctrine by misinterpreting the federal law of railroad abandonment or ICC decisions relating thereto.

The Court should not be misled by the simplistic argument made in Point III of respondents' Brief. Respondents say: 1) the ICC found a de facto abandonment of the railroad right-of-way; and 2) the ICC issued its Certificate permitting abandonment; and 3) thereafter the Missouri Court of Appeals applied state railroad abandonment law to determine ownership of the right-of-way property. Therefore, according to respondents, federal pre-emption is not an issue. (It is important to note that the state law issue of abandonment did not include a claim that KCATA had abandoned the right-of-way. Only the conduct and intent of the predecessor railroad, Freight Operation, was considered in the state court proceedings on the issue of abandonment. No one has suggested that KCATA has abandoned the right-of-way.) Respondents' argument, however, begs these important questions: Did the ICC have jurisdiction to find an abandonment? Was an abandonment permitted by the ICC prior to November 2, 1981 (which clearly it was not)? Could there be an abandonment of the right-of-way by Freight Operation when it sold the right-of-way to KCATA for public purposes pursuant to 49 U.S.C. §10906?

Whether or not the Missouri Court of Appeals chose to address these questions is not the issue. The pre-emption doctrine is not so frail as to lose its vitality simply because a state appellate court chooses to ignore it.

V. Title 49 U.S.C. §10906 does not require the immediate public use of railroad property sold thereunder.

Respondents argue, on page fifteen of their Brief, that 49 U.S.C. §10906 requires "present, feasible, alternative public uses." The language of the statute is set out in Appendix D of the Petition and it contains no requirement that the right-of-way be used immediately if sold for public purposes. Respondents' position is fundamentally flawed by its short-sightedness. A reasonable time for planning, acquisition, funding and development must certainly be contemplated by §10906 for projects such as proposed for this right-of-way. Nor can it be said that Petitioner is insincere about its intent to develop a light rail system. The ICC found, in its decision dated August 19, 1981 that KCATA was a "bi-state transportation authority with firm development plans for mass transit use of the right-of-way," (respondents' Appendix A, A21).

Petitioner has no quarrel with the holding in the Iowa case cited by respondents, *McKinley v. Waterloo Railroad Co.*, 368 N.W.2d 131. That case holds that 49 U.S.C. §10906 unquestionably permits a sale of a right-of-way and that the ICC can prohibit the railroad for 180 days from disposing of the right-of-way for private purposes. That is exactly what the ICC did here.

CONCLUSION

For the foregoing reasons and upon the authorities and arguments set out in the Petition, petitioner prays the Court to issue its Writ of Certiorari.

Respectfully submitted,

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